No. 05-1240
Title: Andre Wallace, Petitioner
v.
Chicago Police Officers Kristen Kato and Eugene Roy
Docketed: March 27, 2006
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (04-3949)
Decision Date: March 8, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 22 2006	Petition for a writ of certiorari filed. (Response due April 26, 2006)
Apr 20 2006	Order extending time to file response to petition to and including May 26, 2006.
May 18 2006	Brief of respondents Chicago Police Officers Kristen Kato and Eugene Roy in opposition filed.
May 30 2006	DISTRIBUTED for Conference of June 15, 2006.
May 30 2006	Reply of petitioner Andre Wallace filed.(Distributed)
Jun 19 2006	Petition GRANTED limited to the following Question: "When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?"
Jul 28 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 24, 2006.
Aug 14 2006	SET FOR ARGUMENT on Monday, November 6, 2006.
Aug 24 2006	Brief of petitioner Andre Wallace filed.
Aug 24 2006	Joint appendix filed.
Sep 13 2006	CIRCULATED.
Sep 19 2006	Order extending time to file respondent's brief on the merits to and including October 10, 2006.
Oct 3 2006	Record received from U.S.C.A. for 7th Circuit. (1 envelope)
Oct 10 2006	Brief amici curiae of National League of Cities, et al. filed. (Distributed)
Oct 10 2006	Brief amici curiae of Illinois, et al. filed. (Distributed)
Oct 10 2006	Brief amicus curiae of Cook County filed. (Distributed)
Oct 10 2006	Brief of respondents Chicago Police Officers Kristen Kato and Eugene Roy filed. (Distributed)
Oct 24 2006	Reply of petitioner Andre Wallace filed. (Distributed)
Oct 25 2006	Record received from U.S.D.C. for Nothern District of Illinois. (1 box)
Nov 6 2006	Argued. For petitioner: Kenneth N. Flaxman, Chicago, Ill. For respondents: Benna Ruth Solomon, Deputy Corporation Counsel, Chicago, Ill.

Supreme Court, U.S.
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No. ~~OFFICE OF THE CLERK~~

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

ANDRE WALLACE

Petitioner,

v.

CITY OF CHICAGO KRISTEN KATO AND EUGENE ROY,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As framed by Judge Posner in his opinion dissenting from the denial of rehearing en banc in this case,

> The panel decision creates an intercircuit conflict on a recurrent issue: when does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment, or a coerced confession forbidden by the due process clause of the Fifth Amendment, accrue, when the fruits of the search or the confession were introduced in the claimant's criminal trial, and he was convicted?

2. When an arrest without probable cause results in eight years of incarceration before charges are dismissed after a final adjudication that a confession of dubious reliability was secured by exploiting the unlawful arrest and, as the tainted fruit of that arrest, is inadmissible under *Brown v. Illinois*, 422 U.S. 590 (1975):

> May damages be recovered in an action brought under 42 U.S.C. §1983 for the unlawful seizure that began at the time of arrest and continued to the time that charges were dismissed, or are damages limited to compensation for the brief period of time that elapsed from arrest to arraignment?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Andre Wallace respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 8, 2006.

OPINIONS BELOW

The decision of the court of appeals (Pet.App. 1-18), and the opinion of Judge Posner dissenting from the denial of rehearing en banc, (Pet.App. 19-28), are not yet reported. The opinions of the district court (Pet.App. 30-36, 37-52) are not officially reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (Pet.App. 29) was entered on March 8, 2006.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

On January 17, 1994, a man named John Handy was shot and killed in a building located at 825 North Lawndale Avenue in Chicago. Handy had been working as a "house sitter" for a construction company that was rehabbing the building.

Chicago police officers Roy and Kato, respondents in this Court, arrested petitioner in the evening of January 19, 1994 in connection with the Handy murder: the officers came upon petitioner on the street near the scene of the murder, handcuffed petitioner, and transported him to a police station. Petitioner was then 15 years of age.

The officers placed petitioner into an "interview room" at the police station. There, petitioner told respondents Roy and Kato that he was seventeen years of age, that he was not involved in the Handy homicide, and that he had been with two other persons at a

restaurant at the time of the murder. Thereafter, respondents Kato and Roy tricked petitioner into making a false confession by playing "good cop/bad cop."

Based on the confession and without any other evidence to corroborate his involvement in the homicide, petitioner was charged with murder and prosecuted as an adult. The state trial judge denied motions challenging the arrest and seeking to suppress petitioner's confession and petitioner was found guilty of murder. On direct appeal, the Illinois Appellate Court concluded that plaintiff had been unlawfully arrested, and remanded the case for an attenuation hearing. *People v. Wallace*, 299 Ill.App.3d 9, 701 N.E.2d 87 (1998).

The trial judge reinstated petitioner's conviction on remand, but the Illinois Appellate Court reversed in an unpublished opinion, finding that the confession was the tainted fruit of the unlawful arrest and remanded for a new trial. Review was denied by the Illinois Supreme Court, *People v. Wallace*, 197 Ill.2d 582, 763 N.E.2d 776 (2001) (table). The prosecutor dismissed all charges against petitioner on April 10, 2002.

Petitioner filed this action on April 3, 2003, raising several state and federal claims. The district court granted summary judgment to respondents on petitioner's state law claims, (Pet.App. 30-37), and permitted petitioner to file an amended complaint on his federal claims.

Petitioner alleged in his amended complaint that he had been deprived of rights secured by the Fourth and Fourteenth Amendments when he was arrested in 1994 and when testimony about his post-arrest inculpatory statement was used against him at trial. The district

court granted summary judgment to respondents on these claims. (Pet.App. 38-51.)

On appeal, a panel of the Seventh Circuit affirmed, holding that petitioner's claims about his arrest and subsequent confession were time barred. (Pet.App. 18.) To reach this result, the panel invoked a circuit rule that permits a panel to reverse a prior decision of the court of appeals by circulating its proposed decision to all active members of the court and inviting a vote on rehearing en banc. (Pet.App. 2 n*.) Using this rule, the panel overruled two of the Seventh Circuit's recent decisions, *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003) and *Wiley v. City of Chicago*, 361 F.3d 994 (7th Cir. 2004), and adopted a bright line rule that all claims "for false arrest or similar Fourth Amendment violations" accrue at the time of arrest. (Pet.App. 13.) The court of appeals described its rule as "an arguable extension" of *Heck v. Humphrey*, 512 U.S. 477 (1994), (Pet.App. 12), but reasoned that "a clear accrual rule is superior to a case-by-case rule." (Pet.App. 14.)

Judge Posner dissented from the refusal of the Court to re-hear the case en banc, (Pet.App. 19-28), pointing out that the bright line rule adopted by the panel was at odds with *Heck v. Humphrey*, *supra*, and departed from "[e]very other case to address the issue." (Pet.App. 19.) "I count 12 cases to 0 against the panel's approach, with the other three cases . . . non-committal but consistent with the 12." (Pet.App. 28.)

REASONS FOR GRANTING THE WRIT

-I-

This case presents the court with an opportunity to resolve what Judge Posner, dissenting below from the denial of rehearing en banc, aptly described as an "intercircuit conflict on a recurrent issue." (Pet.App. 19, 28.) The question, as framed by Judge Posner (Pet.App. 19), is as follows:

> When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment, or a coerced confession forbidden by the due process clause of the Fifth Amendment, accrue, when the fruits of the search or the confession were introduced in the claimant's criminal trial, and he was convicted?

The rule that the Seventh Circuit adopted in this case is that "[i]ndividuals and attorneys who wish to preserve a claim for false arrest or similar Fourth Amendment violations should file their civil rights action at the time of arrest." (Pet.App. 13.) This rule is fully applicable when, as in this case, the only evidence of guilt had been obtained by exploiting an unlawful arrest. As Judge Posner pointed out, (Pet.App. 28), the Seventh Circuit stands alone in this bright line rule.[1]

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1. The panel asserted that it was adopting a rule shared by five other circuits. (Pet.App. 15.) Judge Posner correctly pointed out that the panel misread cases from those five circuits. (Pet.App. 24-27.) See *infra* at 7-9.

The Seventh Circuit's categorical rule is contrary to the decision of this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994), and is in conflict with the case by case analysis applied by the court of appeals for ten other circuits.[2]

In *Heck v. Humphrey, supra*, the Court held that a §1983 "cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated."[3] (footnote omitted) 512 U.S. at 489-90. The Court held that the civil action would not accrue if success in the damage action "would necessarily imply the invalidity of [the plaintiff's] conviction or sentence." *Id.*

The example that the Court provided in *Heck* of a civil action that "would necessarily imply the invalidity" of a criminal conviction is a conviction for resisting arrest, where an element of the offense was that the criminal defendant intentionally prevented a lawful arrest. 512 U.S. at 486 n.6. Such a conviction would

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2. The Court of Appeals for the District of Columbia Circuit does not appear to have decided this issue in a published opinion. *But see Aleotti v. Baars*, 896 F.Supp. 1, 4 (D.D.C. 1995) (applying a fact specific analysis).

3. As a corollary to its rule of accrual, the Seventh Circuit holds that §1983 does not permit the recovery of damages for an unconstitutional conviction that was invalidated because it was based on the tainted fruit of an unlawful arrest. See *infra* at 11-16.

bar a §1983 action challenging the legality of the arrest. *Id.*

Aside from the Seventh Circuit, the courts of appeals are in agreement that *Heck* mandates that "in a case where the only evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence." *Covington v. City of New York*, 171 F.3d 117, 123 (2d Cir. 1999) Thus, a §1983 claim could not be brought in a case "where all the evidence to be presented was obtained as the result of an illegal arrest," until the criminal case had been resolved in favor of the civil rights plaintiff. *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 559 n.4 (10th Cir. 1999), The uniform reading of *Heck* — aside from that of the Seventh Circuit — is that "a §1983 action alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned." *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998).

In its decision in this case, the Seventh Circuit panel asserted that its categorical rule is consistent with decisions in five circuits. (Pet.App. 15.) Judge Posner, in his dissenting opinion, correctly observed that the panel's count is based on a misreading of these cases. (Pet.App. 24-27.) Moreover, the cases that the panel cited from the Third, Eighth, Tenth, and Eleventh Circuits have been superseded by more recent decisions from those circuits which show that "the general trend among the Courts of Appeals has been to employ the fact-based approach." *Gibson v. Superintendent of NJ*

Dept. of Law, 411 F.3d 427, 449 (3d Cir. 2005).

The panel did not cite *Gibson, supra*, but relied on an earlier, and distinguishable, Third Circuit case, *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998). (Pet.App. 15; App. 25, Posner, J., dissenting from denial of rehearing en banc).

Similarly, the panel relied on *Simmons v. O'Brien*, 77 F.3d 1083 (8th Cir. 1996) (Pet.App. 15-16), which is distinguishable, (Pet.App. 26, Posner, J., dissenting from denial of rehearing en banc), and which has been superseded by *Anderson v. Franklin County, Mo.*, 192 F.3d 1125, 1131 (8th Cir. 1999) (fact-based approach applied to uphold a district court's order dismissing §1983 claims of false arrest and imprisonment because the criminal conviction had not been set aside)

The panel's misreading of the Tenth Circuit's decision in *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553 (10th Cir. 1999), (Pet.App. 15) is apparent from that circuit's subsequent decision in *Laurino v. Tate* 220 F.3d 1213 (10th Cir. 2000). There, the court of appeals mandated a case by case analysis, because "*Heck* requires a court considering a §1983 damage claim relating to a plaintiff's conviction to determine whether a judgment in favor of the plaintiff would necessarily imply the invalidity of the conviction; if so, then the plaintiff must obtain invalidation of the conviction before pursuing his action for damages." *Id.* at 1217.

Moreover, the Eleventh Circuit case relied on by the panel, *Datz v. Kilgore*, 51 F.3d 252 (11th Cir. 1995) (per curiam) is factually distinguishable, (Pet.App. 25-26), Posner, J., dissenting from denial of

rehearing en banc), and has been superseded by *Hughes v. Lott*, 350 F.3d 1157, 1161 (11th Cir. 2003), where the court held that the fact specific inquiry mandated by *Heck* requires a district court to "look both to the claims raised under §1983 and to the specific offenses for which the §1983 claimant was convicted." *Id.* at 1161 n.2.

The case by case analysis applied in all circuits aside from the Seventh Circuit is illustrated in three cases from the First Circuit, one of the circuits that the panel incorrectly cited as supporting its bright line rule. (Pet.App. 15.)

In *Guzman-Rivera v. Rivera-Cruz*, 29 F.3d 3 (1st Cir. 1994), the court of appeals held that the plaintiff's claims would be barred by a criminal conviction, and remanded for a determination of whether the conviction had been "invalidated as required under *Heck*." In *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1 (1st Cir. 1995), where the plaintiffs had been acquitted, the First Circuit reversed the district court's conclusion that the §1983 claims had accrued at the date of arrest and held that, under *Heck*, the claims accrued at the time of acquittal. Thereafter, in *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001), the court of appeals, while recognizing that "that there may be rare and exotic circumstances in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest," 241 F.3d at 52 n.4, held that claims involving physical abuse or arrest accrued "at the time that those events occurred." *Id.* at 52. The court recognized that a Fourth Amendment claim involving a "continuing seizure" during the criminal prosecution would have accrued at the time of acquittal, *id.* at 53, but held that

"the relatively benign nature of the pretrial release conditions" in that case did not amount to "a post-arraignment seizure within the meaning of the Fourth Amendment."[4] *Id.* at 57.

The Seventh Circuit acknowledged that its bright line rule has been rejected by the courts of appeals for the Second, Fourth, Fifth, Sixth, and Ninth Circuits.[5] The courts of appeals from the First, Third, Eighth, Tenth, and Eleventh Circuits must be added to this total. See *ante* at 7-9. As Judge Posner noted in his opinion dissenting from the denial of rehearing en banc, the Seventh Circuit had forged "a lonely path," and presents this Court with "an intercircuit conflict on a recurrent issue." (Pet.App. 28.) Certiorari should be

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4. The post-arraignment seizure in this case consists of 8 years of incarceration, which is far from "benign."

5. *Woods v. Candela*, 47 F.3d 545, 546 (2d Cir. 1995) (per curiam); *Covington v. City of New York*, 171 F.3d 117, 123 (2d Cir. 1999) *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996); *Lambert v. Williams*, 223 F.3d 257 (4th Cir. 2000); *Ballenger v. Owens*, 352 F.3d 842, 846-47 (4th Cir. 2003) *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995); *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 398-99 (6th Cir. 1999); *Baranski v. Fifteen Unknown Agents*, 401 F.3d 419, 433-36 (6th Cir. 2005) *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002); *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998);

granted to resolve this conflict.

-II-

The Seventh Circuit stands alone in limiting the damages that may be recovered in a §1983 action arising from an unlawful arrest to compensation "for injuries suffered from the time of arrest until . . . arraignment."[6] (Pet.App. 7.) Thus, even if petitioner had filed his §1983 action the day after his unlawful arrest, and the district court then stayed the action until the conclusion of the state criminal case, the Seventh Circuit's rule would not allow a jury to award petitioner damages for his eight years of his incarceration — damages would be limited to the brief period between arrest and arraignment.[7]

The Seventh Circuit's limitation on damages is contrary to the bedrock principle that §1983 incorporates the "background of tort liability that makes a man responsible for the natural consequences of his

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6. The Seventh Circuit adopted this rule in *Gauger v. Hendle*, 349 F.3d 354, 362-63 (7th Cir. 2002), where it expressly reserved the question, that it resolved in this case (Pet.App. 13-14), of whether damages could be awarded a §1983 plaintiff for post-arraignment injuries on the theory that "the seizure of his person was from the beginning to the end of his incarceration unreasonable." 349 F.3d at 360.

7. The time between arrest and arraignment in felony cases in Illinois is typically thirty days.

actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). *See, e.g., Brower v. County of Inyo*, 489 U.S. 593, 599 (1989), where the Court held that police officers who establish a roadblock "in such manner as to be likely to kill [a motorist]," may be liable under §1983 for their unreasonable seizure. The Seventh Circuit's limitation on damages also renders §1983 a poor deterrent to unlawful arrests.

The Seventh Circuit explained its decision to depart from ordinary rules of proximate cause by asserting that "the injury occurs at the time of the arrest," (Pet.App. 7), and that "the scope of a Fourth Amendment claim is limited up until the point of arraignment." *Id.* Neither of these explanations can be reconciled with prior decisions of this Court holding that a confession secured as the proximate result of an illegal arrest is the "tainted fruit" of the arrest and must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975); *Taylor v. Alabama*, 457 U.S. 687 (1985). Just as the mere giving of *Miranda* warnings does not insulate a confession from an unlawful arrest, *Brown v. Illinois*, 422 U.S. at 602-03, the "point of arraignment" is not an intervening event that breaks the causal link between the unlawful arrest and eight years of incarceration.

The Court rejected a similar attempt to limit causation in *Malley v. Briggs*, 489 U.S. 593 (1989). There, the district court had held that a judge's decision to issue a warrant broke the causal chain between the application for the warrant and the subsequent arrest. The Court rejected this "no causation" rationale as "inconsistent with our interpretation of §1983." Id. at 345 n.7.

The Seventh Circuit's limitation on damages implements that circuit's view that §1983 does not provide a remedy to recover damages that could be obtained in an action for malicious prosecution, i.e., "damages for confinement imposed pursuant to legal process," *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). In *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), *opinion on denial of rehearing*, 260 F.3d 824 (7th Cir. 2001), the Seventh Circuit concluded that the "effective holding" of *Albright v. Oliver*, 510 U.S. 266 (1994) is "that the existence of a state court remedy for malicious prosecution extinguishes any remedy under §1983 for a prosecution without probable cause.[8] 256 F.3d at 751.

A different rule is applied in eight other circuits.

The Second, Third, Sixth, Eighth, and Tenth Circuits recognize a federal cause of action for "malicious prosecution," which consists of the elements of the common law tort of malicious prosecution plus the violation of a federal right. *Washington v. County of Rockland*, 373 F.3d 310, 316 (2d Cir. 2004); *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003), *opinion following remand*, 430 F.3d 140 (3d Cir. 2005); *Thacker v. City of Columbus*, 328 F.3d 244, 258 (6th Cir. 2003); *Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004); *Beedle v.*

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8. The Seventh Circuit stands along in this reading of *Albright*. See *Castellano v. Fragozo*, 352 F.3d 939, 958 (5th Cir. 2003) (en banc).

Wilson, 422 F.3d 1059, 1067 n.4 (10th Cir. 2005).

The Fourth and Eleventh Circuits allow recovery of "malicious prosecution damages" on a Fourth Amendment theory, unburdened by the element of malice that is part of the common law tort of malicious prosecution. *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005) ("In order for a plaintiff to state a section 1983 malicious prosecution claim for a seizure violative of the Fourth Amendment, we have required that the defendant have 'seized [plaintiff] pursuant to legal process that was not supported by probable cause and that the criminal proceedings [have] terminated in [plaintiff's] favor.'" quoting *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183-84 (4th Cir.1996)); *Uboh v. Reno*, 141 F.3d 1000, 1003 (11th Cir. 1998) ("Labeling a section 1983 claim as one for a malicious prosecution can be a shorthand way of describing . . . the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead.")

The First and Fifth Circuits have not taken a conclusive stand on this issue. *Nieves v. McSweeney*, 241 F.3d 46, 54 (1st Cir. 2001) ("It is an open question whether the Constitution permits the assertion of a section 1983 claim for malicious prosecution on the basis of an alleged Fourth Amendment violation.") *Price v. City of San Antonio*, 431 F.3d 890, 895 (5th Cir. 2005) ("We hold only that insofar as any such claim exists, it would not accrue until criminal proceedings terminate in favor of the plaintiff.")

Review by this Court of the conflict about the availability of "malicious prosecution damages" in a §1983 action would permit the Court to resolve the issues discussed in the separate opinions in *Albright v. Oliver*, 510 U.S. 266 (1994).

The question before the Court in *Albright* was whether §1983 authorized a "malicious prosecution" claim on a substantive due process theory. 510 U.S. at 268. There, the petitioner had been charged with a non-existent offense and brought a Section 1983 action against the police officer who had initiated the criminal proceedings. The petitioner did not pursue a Fourth Amendment claim, even though "his surrender to the State's show of authority constituted a seizure for the purposes of the Fourth Amendment." 510 U.S. at 271 (plurality opinion). Instead, the petitioner in *Albright* asserted in this Court "that the action of respondents infringed his due process right to be free of prosecution without probable cause." *Id.*

Albright was decided without a majority opinion. A majority of the Court concluded that the right to be free from prosecution without probable cause was not a substantive due process right. 510 U.S. at 271 (Rehnquist, C.J., joined by O'Connor, Scalia, and Ginsburg, JJ); *id.* at 275 (Scalia, J., concurring); *id.* at 280 (Kennedy, J., concurring in judgment and joined by Thomas, J.); *id.* at 281 (Ginsburg, J., concurring); *id.* at 288-89 (Souter, J., concurring in judgment).

Several members of the Court in *Albright* wrote separately to support the Fourth Amendment as a vehicle for recovery. Justice Ginsburg, in her concurring opinion, endorsed what has come to be known as the

"continuing seizure" theory — that being held to answer criminal charges, being required to appear in court, and being subject to travel restrictions amounts to a seizure under the Fourth Amendment. 510 U.S. at 279. Justice Stevens, joined by Justice Blackmun, agreed with this "continuing seizure" approach in a dissent. *Id.* at 307.

Justice Souter, while not expressing any view about the "continuing seizure" theory, wrote in support of a Fourth Amendment approach and noted that the Courts of Appeals had frequently awarded damages for confinement imposed pursuant to legal process on Fourth Amendment claims. 510 U.S. at 289-90. Justice Kennedy, joined by Justice Thomas, agreed with the plurality that an arrest without probable cause "must be analyzed under the Fourth Amendment," and expressed the view that petitioner's due process claim was satisfied by the availability of a state tort remedy for malicious prosecution. *Id.* at 283-86.

This case provides the Court with an opportunity to resolve the conflict among the circuits about whether a §1983 action allows the recovery of "damages for confinement imposed pursuant to legal process," *Heck v. Humphrey*, 512 U.S. 477, 484 (1994), by answering the Fourth Amendment question that was identified in the separate opinions in *Albright v. Oliver*. The importance of an effective damage remedy to enforce the Fourth Amendment warrants review by the Court.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

March, 2006

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APPENDIX

In the
United States Court of Appeals For the Seventh Circuit

No. 04-3949

ANDRE WALLACE,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, KRISTEN KATO and EUGENE ROY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 CV 2296—**Samuel Der-Yeghiayan,** *Judge.*

ARGUED MAY 31, 2005—DECIDED MARCH 8, 2006

Before EASTERBROOK, ROVNER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* From the age of fifteen until twenty-three, Andre Wallace was serving time in prison for his alleged participation in a murder. After several appeals, the Illinois Appellate Court found that the police had arrested him without probable cause and that his confession was not sufficiently attenuated from his unlawful arrest. At that point, the prosecution decided to leave well enough alone, and Wallace was released.

Only then did Wallace commence the present action: he filed a suit under 42 U.S.C. § 1983 in federal court asserting that Detectives Kato and Roy and the City of Chicago had violated his Fourth Amendment rights and that they had also committed the state torts of malicious prosecution and false imprisonment. The district court granted summary judgment in favor of all three defendants. We affirm. In doing so, we have found it necessary to clarify the law of our circuit concerning when a false arrest claim accrues. We reaffirm the holding of *Booker v. Ward*, 94 F.3d 1052, 105657 (7th Cir. 1996), that false arrest claims accrue at the time of arrest; to the extent that it is inconsistent with *Booker v. Ward* and the present opinion, we overrule *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003).*

I

On January 17, 1994, John Handy was shot and killed at 825 N. Lawndale Avenue near the intersection of Chicago Avenue and Lawndale. Handy had been working as a house sitter for a construction company and had apparently had a previous confrontation with drug dealers in the area .Detectives Kristen Kato and Eugene Roy were assigned to investigate Handy's

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* Because this opinion would overrule an earlier decision of this court, in the manner described in Part II.A. below, it has been circulated among all judges of this court in regular active service .A majority did not wish to hear the case en banc. Circuit Judge Posner voted to hear the case en banc for the reasons stated in his dissent.

murder. After discussing the murder with witnesses and informants in the neighborhood, the police brought Wallace and Laron Jackson in for questioning on the night of January 19, 1994. At the time, the police were not aware that Wallace was only 15 years old because Wallace had told them he was 17 years old.

During the course of the night, Detectives Kato and Roy took turns interrogating Wallace. Wallace, they claim, was free to leave the station house at any time. Wallace's account is somewhat different: he reported that Kato and Roy played "good cop/bad cop" with him to induce him to confess falsely. Kato was the bad guy; whenever Kato took a break, Roy spoke with Wallace and told him that if he confessed, Roy could get Kato to stop hurting him. This continued through the night. At about 4:15 a.m., the detectives confronted Wallace with Jackson's and another witness's statements that they saw Wallace running down the gangway from 825 N. Lawndale after hearing shots. Wallace then admitted that he was only 15. Around 6:00 a.m., Wallace agreed to confess. A youth officer and an assistant state's attorney met with Wallace and read him his *Miranda* rights and took his written statement. In his complaint, Wallace claims that Kato told him not to tell the state's attorney that Kato had promised Wallace that he could go home after he gave his statement.

Before his trial, Wallace filed several motions to suppress his statements on the grounds that his arrest had been made without probable cause and that the statements were coerced and violated his *Miranda*

rights. His motions were all denied. On April 19, 1996, after a bench trial, Wallace was found guilty of first degree murder.

Wallace appealed. In an opinion issued on September 21,1998, the Illinois Appellate Court found that the police arrested him without probable cause and remanded for a hearing to determine whether his statements were sufficiently attenuated from his unlawful arrest to permit their use. On remand, the circuit court found that Wallace's confession was sufficiently attenuated from his arrest and affirmed his conviction. Wallace appealed again,and the Illinois Appellate Court reversed the circuit court's decision and remanded for a new trial. On April 10, 2002, the prosecution filed a *nolle prosequi* motion and dropped the case.

On April 2, 2003, Wallace filed the present suit, asserting that his Fourth Amendment rights had been violated and raising state law claims for false imprisonment and malicious prosecution. Kato and Roy filed an answer and a motion for summary judgment, and the City filed a motion to dismiss. On October 21, 2003, Wallace filed his response just a week before we decided *Gauger v. Hendle*, which held that under the circumstances presented there the statute of limitations did not begin to run until the defendant's conviction was invalidated. 349 F.3d at 361-62.

On March 30, 2004, the district court granted summary judgment for Roy and Kato on all claims except Wallace's federal fair trial claim, which it denied

without prejudice. The court also denied without prejudice the City's motion to dismiss under Fed. R. Civ. P. 12(b)(6). Wallace filed an amended complaint on April 28, 2004, reasserting his Fourth Amendment claims. The defendants answered and filed a second motion for summary judgment, which included an affirmative defense of collateral estoppel. Wallace's response asserted that the defendants had waived their collateral estoppel defense by failing to raise it in their answer to his amended complaint. The defendants moved to amend their answer.

On October 29, 2004, the court granted the defendants motion to amend their answer to assert their collateral estoppel defense and in the same order granted the defendants' motion for summary judgment. It concluded that Wallace had conceded that his false arrest claim was time-barred. Alternatively, the court held that even if Wallace was allowed to replead his claim under the more recent decision in *Gauger*, he would still be time-barred because Wallace could have brought the claim after the Illinois Appellate Court found on September 21, 1998, that Wallace was arrested without probable cause. This was so even though the appellate court remanded the case to the trial court to determine whether Wallace's confession was sufficiently attenuated from his illegal arrest. The district court concluded that at this point it was possible that even if Wallace was illegally arrested his conviction could still stand, and thus he could not take advantage of the *Gauger* rule.

A. False Arrest Claim

Wallace brought his false arrest claim for violation of his Fourth Amendment rights under 42 U.S.C. § 1983.Before turning to the merits of the claim, we address briefly the government's argument that it is waived (or more properly, forfeited) because Wallace failed to raise it in a timely manner in the district court. Our review of the record shows that Wallace initially conceded that his false arrest claim was time-barred in the responsive papers he filed on October 21, 2003, under pre-*Gauger* law. After *Gauger* appeared a week later and before the district court ruled on the defendants' second motion for summary judgment, Wallace changed his position and asserted the merits of the false arrest claim. We therefore conclude that he neither waived nor forfeited this argument below.

Although federal law governs the question of the accrual of constitutional torts, state statutes of limitations and tolling doctrines apply once accrual has been determined. See *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989); see also *Gonzalez v. Entress*, 133 F.3d 551, 554 (7th Cir.1998). Wallace's false arrest claim is subject to the two-year statute of limitations supplied by Illinois law under 735 ILCS § 5/13-202. In his case, that period was tolled until November 7, 1999, two years after Wallace turned eighteen years old, by virtue of 735 ILCS § 5/13-211. If Wallace's claim accrued as of April 10, 2002, when his conviction was finally nullified and the state dropped his case, then the suit filed on April 2, 2003, easily met the two-year deadline. If, on the other

hand, his claim accrued at the time of his arrest on January 20, 1994, his claim is time-barred, even taking into account the tolling that occurred during the period of his minority. Everything depends, therefore, on the accrual rule we must use.

In principle, there are at least three approaches we could take to the accrual of Fourth Amendment claims: (1) the Fourth Amendment claim arises at the time of the wrong (*i.e.*, the false arrest, the unlawful search); (2) the Fourth Amendment claim accrues only after the underlying conviction definitively has been set aside; or (3) as *Gauger* suggested, accrual depends on how central the evidence was to the conviction: if it was non-essential, use rule 1; if it was critical, use rule 2. Before settling on our preferred option, it is useful to review the underlying law in this area.

When a person's Fourth Amendment rights have been violated by a false arrest, the injury occurs at the time of the arrest. Thus, an individual is entitled to recover only for injuries suffered from the time of arrest until his arraignment. *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir.2004) ("[W]e have held that the scope of a Fourth Amendment claim is limited up until the point of arraignment.");see also *Gauger*, 349 F.3d at 363 ("[T]he interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects."). On the other hand, as Wallace's own case illustrates, it is often the case that the prosecution cannot proceed without the fruits of an unlawful arrest (as Wallace's confession was) or an unlawful search. In those cases, the idea that

the claim accrues at the time of the injury runs into some tension with the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994).

In *Heck*, the Court held that a constitutional claim that would undermine a criminal conviction if vindicated cannot be brought until the defendant's conviction is nullified. *Id.* at 486-87. This general rule, which works perfectly well for complaints like the ones about the knowing destruction of evidence and illegal identification procedure raised in *Heck*, has caused some courts—including this one in *Gauger*—to conclude that certain Fourth Amendment claims also do not accrue until after the defendant's conviction has been invalidated. See, *e.g.*, *Gauger*, 349 F.3d at 362; *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (holding that Fourth Amendment claims based on illegal search and seizure of evidence are not cognizable until the conviction is overturned or charges dismissed); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999) (finding that generally false arrest claims accrue at the time of arrest, but that if success in the §1983 case would "imply the invalidity of a conviction in a pending criminal prosecution," it does not accrue "so long as the potential for a judgment in the pending criminal prosecution continues to exist").

Heck itself instructs that a district court must:

> consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can

> demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 487 (emphasis in original) (footnotes omitted).Footnote seven in *Heck* anticipates at least some Fourth Amendment cases. It suggests that despite the general rule of *Heck,* a suit for damages arising from an unreasonable search could go forward as a §1983 claim without invalidating a criminal prosecution, because of the independent source or inevitable discovery doctrines. In *Gonzalez,* we saw two implications in the footnote: "(i) a claim based on an unlawful search or arrest may be brought immediately, because a violation of the fourth amendment does not necessarily impugn the validity of a conviction—the evidence may be properly admitted anyway, or it may be excluded and the defendant convicted on other evidence —and (ii) a claim of damages based on the injury of being convicted is impermissible until the conviction has been overturned." 133 F.3d at 553 (internal quotation marks omitted).

In *Booker v. Ward,* we interpreted *Heck* to allow a false arrest claim to go forward before the defendant's conviction was invalidated:

> [A] wrongful arrest claim, like a number of other Fourth Amendment claims, does not inevitably

> undermine a conviction; one can have a successful wrongful arrest claim and still have a perfectly valid conviction. Although in this case the Illinois Appellate Court's conclusion that Booker's confession was the inadmissible product of an unlawful arrest ultimately resulted in the dismissal of murder charges against Booker, in many cases, the prosecutor will have other witnesses or other evidence that will support a retrial.

94 F.3d at 1056 (citations omitted). The approach that the court took looked to the legal nature of the wrongful arrest claim, rather than to the specific facts of the case.

The *Gauger* opinion, in contrast, rejects an across-the board approach to Fourth Amendment claims in favor of a case-by-case examination under which at least some false arrest claims would not accrue until after the conviction was invalidated:

> It might be argued that Gauger could have sued right after his arrest, even if he might also have waited until his criminal conviction was thrown out. But we do not think that such a conclusion would be consistent with *Heck*. For he could not knock out the arrest without also (by virtue of *Wong Sun* [*v. United States*, 371 U.S. 471 (1963)]) invalidating the use in evidence of his admissions, without which, as we have said, he could not be convicted. *Heck*, to repeat, says that a criminal defendant can't sue for damages for violation of his civil rights, if the ground of his suit is inconsistent with his conviction having been constitutional until he gets the conviction thrown out.

349 F.3d at 362. See also *Wiley*, 361 F.3d at 997-98.

In our view, although it is conceivable that there are factual differences among Booker's, Gauger's, and Wallace's cases, the distinctions are unimportant in the end. In Gauger's case, the police suspected Gauger of murdering his parents. 349 F.3d at 356. They brought him in for questioning and Gauger made several incriminating statements that, according to his version of the interrogation, were stated as hypotheticals. *Id.* at 357. Gauger was convicted and sentenced to death. On appeal, the Illinois Appellate Court determined that his statements were inadmissible as the product of an unlawful arrest. *Id.* The court ordered a new trial, but the state never retried him and the charges were dropped after two members of the Outlaws motorcycle gang confessed killing Gauger's parents. *Id.* at 358. The resemblance to Wallace's case is plain.

It is true that in Booker's case, as in Wallace's, the state appellate court first remanded for an attenuation hearing before ordering a new trial. See *Booker v. Ward*, 94 F.3d at 1054. The result of the attenuation hearing was a conclusion that the confession was sufficiently attenuated from the defendant's unlawful arrest, but the Illinois Appellate Court reversed. *Id.* Just as in Wallace's case, at this point the prosecution filed a motion for a *nolle prosequi*, and the court dropped the charges against Booker. *Id.* It is telling that in both Booker's and Wallace's cases, the state appellate court formally decided that the defendant's criminal prosecution could continue even though the arrests were

unlawful. Only the pragmatic judgment of the prosecutors, which could have rested on a conclusion that it was unlikely that any additional evidence existed, or on a lack of resources for further investigation, or any of a number of other factors, caused the cases to end. The rule we articulated in *Booker v. Ward* recognizes that *ex ante* it is not readily apparent which criminal cases might proceed despite the consequences of the successful Fourth Amendment challenge. This, in our view, argues against a rule that requires judges several years after the event to decide whether a particular Fourth Amendment challenge would have been the death knell of the prosecution.

Even if a clear rule is what is needed, we still need to decide between options (1) and (2) above: that is, between a rule saying that all claims of this type accrue at the time of injury, and a rule that they all accrue only when the criminal conviction has been set aside. The footnote in *Heck* to which we referred earlier persuades us that the Supreme Court did not contemplate the second rule as it took care to suggest that the statute of limitations should begin running on at least some claims at the time of the original injury. Although the Court refrained from holding that all Fourth Amendment claims accrue immediately, it had no need to reach that issue in *Heck*. We conclude that the approach taken by *Booker v. Ward*, while an arguable extension of *Heck*, is an extension that is justifiable in light of the policies behind both the statute of limitations and the need to avoid unnecessary interference with the outcomes of criminal proceedings.

To the extent, therefore, that *Gauger* eschews a clear rule for false arrest claims in favor of an evaluation of the evidence, we disapprove its approach and instead reaffirm our holding in *Booker v. Ward* that a "§ 1983 unlawful arrest claim . . . accrue[s] on the day of [ ] arrest." *Id.* at 1056-57. Individuals and attorneys who wish to preserve a claim for false arrest or similar Fourth Amendment violations should file their civil rights action at the time of arrest. It will still be possible, of course, for a district court to stay any such action until the criminal proceedings are concluded, should it conclude in its discretion that a stay would be useful. We note as well that we are addressing only the question of accrual; other doctrines, such as equitable tolling, may also affect the time in which a particular suit may be brought. See *Heck*, 512 U.S. at 489 (reserving judgment on whether equitable tolling applies in this context).

One additional qualification is necessary, which in our view answers the concerns expressed in the dissent. *Heck* itself recognized that it is possible for a § 1983 claim based on false arrest or a similar Fourth Amendment violation "necessarily [to] imply the invalidity of [a plaintiff's] conviction or sentence," *Heck*, 512 U.S. at 486 n.6, 487 (example of plaintiff convicted of resisting arrest who challenges legality of arrest). The case to which the Court pointed, however, is one in which the fact of a Fourth Amendment violation is an element of the claim. In that relatively uncommon set of cases, there is an independent treason to insist that a plaintiff wait to sue until the criminal conviction has

been set aside; if she does not, the possibility of inconsistent rulings on the validity of the arrest is too great. Our ruling addresses the normal run of cases, in which the Fourth Amendment violation affects only the evidence that might or might not be presented to the trier of fact. In those instances, we are convinced that a clear accrual rule is superior to a case-by-case approach.

As the parties have noted, the question of the proper rule for accrual is an issue that has divided our sister circuits. Although their reasoning varies, the Second Fourth, Fifth, Sixth, and Ninth Circuits have held that false arrest claims that would undermine the defendant's conviction cannot be brought until the conviction is nullified. See *Harvey*, 210 F.3d at 1015 (acknowledging circuit split and holding flatly that "a § 1983 action alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned"); *Covington*, 171 F.3d at 124; *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 399 (6th Cir. 1999) (explicitly rejecting suggestion that § 1983 illegal search claims accrue at the time of injury, since such a rule would "misdirect the criminal defendant" from focusing on "mounting a viable defense to the charges against him"); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (holding that success on false arrest claim would "necessarily imply" that conviction for disturbing the peace was invalid as not based on probable cause); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996) (*Heck* bars civil rights claims "when a § 1983 plaintiff's success on a

claim that a warrantless arrest was not supported by probable cause necessarily would implicate the validity of the plaintiff's conviction or sentence"); *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (stating that "a claim of unlawful arrest, standing alone, does not necessarily implicate the validity of a criminal prosecution following the arrest," but staying the civil action until the criminal prosecution was completed).

The First, Third, Eighth, Tenth, and Eleventh Circuits have held that false arrest claims accrue at the time of the arrest. *Nieves v. McSweeney*, 241 F.3d 46, 52-53, 52 n.4 (1st Cir. 2001) (stating that "it is pellucid that all claims based on the officers' physical abuse or arrest of the appellants accrued at the time that those events occurred . . . because the appellants had ample reason to know of the injury then and there," and characterizing as "rare and exotic" the "circumstances in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest"); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558, 559 n.4 (10th Cir. 1999) ("We generally disagree with the holdings in [*Covington* and *Mackey*] because they run counter to *Heck*'s explanation that use of illegally obtained evidence does not, for a variety of reasons, necessarily imply an unlawful conviction."); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998) (finding § 1983 false arrest claim not barred by *Heck*); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (finding § 1983 coerced confession claim not barred by *Heck*); *Datz v. Kilgore*, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (per curiam) (finding § 1983 illegal search claim not barred by *Heck*).

By aligning ourselves with one side of this debate, we do not break any new ground.

B. False Confession Claim

Wallace also asserts a "false confession" claim that he claims is actionable under the Fourth Amendment, relying on the following language in *Gauger*:

> [Gauger's] incarceration resulted from the combination of a false arrest with (if his testimony is believed)a false account of his interrogation. If his testimony is believed, therefore, the seizure of his person was from the beginning to the end of his incarceration unreasonable, and shouldn't that bring the allegedly fraudulent account of his interrogation under the Fourth Amendment?

349 F.3d 360. In support of his claim, Wallace tries to distinguish a "continuing Fourth Amendment violation" from the "continuing seizure" theory discussed in Justice Ginsburg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994). See *id.* at 279 (Ginsburg, J., concurring). His efforts are necessary, at least in this court, because we have already rejected a "continuing seizure" theory in the Fourth Amendment context. See *McCullah v. Gadert*, 344 F.3d 655, 661 (7th Cir. 2003) (citing *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n.3 (7th Cir. 1996)). Nonetheless, we find them unavailing. Wallace tries to find some support for it in *Chavez v. Martinez*, 538 U.S. 760 (2003), but as we read that case it dealt only with the Fifth Amendment and the due process clauses. We reject the idea of a stand-alone "false confession" claim based on the Fourth

Amendment, rather than the Fifth Amendment or the due process clauses.

C. Fourteenth Amendment Claim

Finally, Wallace tries characterizing his false confession claim as a violation of his Fourteenth Amendment right to a fair trial. Wallace contends that our decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), allows for a "false confession" claim as a due process violation. In *Newsome*, we affirmed the district court's decision to deny qualified immunity to two officers who had withheld exculpatory evidence from the defendant. *Id.* at 753. The reason was because, under *Brady v. Maryland*, 373 U.S. 83 (1963), officers who withhold such material violate a defendant's right to a fair trial. 256 F.3d at 752. See also *Ienco v. City of Chicago*, 286 F.3d 994, 999 (7th Cir. 2002) (allowing plaintiff to amend complaint to assert due process claim against police officers who withheld evidence); *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988) (allowing claim against officers who allegedly fabricated evidence and concealed exculpatory evidence to go forward).

As these brief summaries demonstrate, *Newsome*, *Ienco*, and similar cases do not stand for the proposition that there is a free-standing due process claim whenever unfair interrogation tactics (short of those that may shock the conscience and thereby implicate the Supreme Court's substantive due process rulings) are used to obtain a confession. Instead, they are grounded in traditional notions of what is required for a fair trial, including the *Brady* right to be given exculpatory

material. In the end, all Wallace has is a complaint about the arrest and the subsequent confession, and that is the claim we have found to be time-barred. He cannot escape that result merely by re-characterizing the claim under a different part of the Constitution.

III

The City argued in the alternative that Wallace was not entitled to bring his suit under the *Heck* rule because the state court proceedings did not conclude in his favor. It reasons that the state *trial* court found that his confession was voluntary; that this finding was not disturbed as a matter of Illinois law when the state appellate court reversed and remanded the trial court's judgment; and that Wallace cannot prevail in his § 1983 action if this central fact is taken as established. Because we have resolved this appeal in favor of all three defendants on the statute of limitations ground, we decline to reach the City's alternative argument. It depends centrally on the intricacies of the law of collateral estoppel in Illinois, which is a topic on which all we could do in any event is to follow the Illinois courts to the best of our ability.

The judgment of the district court is AFFIRMED.

POSNER, *Circuit Judge*, dissenting from denial of rehearing en banc. The panel decision creates an intercircuit conflict on a recurrent issue: when does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment, or a coerced confession forbidden by the due process clause of the Fifth Amendment, accrue, when the fruits

of the search or the confession were introduced in the claimant's criminal trial, and he was convicted? The panel holds that, except in the rare case in which a violation of the Fourth Amendment is an element of the crime with which the defendant is charged, it always accrues at the time of the arrest, search, or confession. Every other case to address the issue, including our own *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003), holds that it *usually* accrues then, but not if the Fourth or Fifth Amendment claim, if valid, would upset the conviction. If it would, the claim does not accrue unless and until the conviction is vacated. In other words, a civil rights suit is not a permissible vehicle for a collateral attack on a conviction.

That is the holding of *Heck v. Humphrey*, 512 U.S. 477 (1994). The Court said that the district court must "consider whether a judgment [in the civil rights suit] in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 486-87. The Court gave the following example of "a § 1983action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful": "A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. . . . He then brings a § 1983 action against the arresting officer, seeking damages for violation of

his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning res judicata, . . . the § 1983 action will not lie." 512 U.S. at 486 n. 6 (emphasis in original). Faced with this flat statement, the panel carves the exception to its new rule that I mentioned in the first paragraph but does not give a reason for limiting the Court's exception to the particular illustration that the Court gave. The panel says only: "we are convinced that a clear accrual rule is superior to a case-by-case approach." It does not explain the source of its conviction.

Its accrual rule is not "clear," as I'll point out; it is also inconsistent with the principles of accrual. A suit cannot be filed—the claim on which it is based cannot have accrued—at a time when, because a condition precedent to suit has not been satisfied, the suit must be dismissed. The panel holds that the suit must be filed within the limitations period for section 1983 suits (usually two years) from the date of the arrest, search, or, as in this case, confession, even if at the end of the two years the plaintiff's conviction has not been vacated and even if the only evidence of his guilt presented at his criminal trial was the challenged evidence or confession. This is so, the panel holds, even though, to quote *Heck*, a judgment in the plaintiff's favor in the civil suit "would necessarily imply the invalidity of his conviction" because it would wipeout all of the evidence against him.

And if the plaintiff waits to sue until his conviction is vacated, he will not have the full statutory period within which to sue because he will be able to avoid dismissal only by appealing to the doctrine of equitable tolling. (That's assuming equitable tolling is available in *Heck* cases, a question the panel leaves open.) Equitable tolling permits a plaintiff to delay suing beyond the statutory limitations period if he is unable despite all due diligence to sue within the period; but as soon as he is able to sue he must. He is denied the benefit of the full statutory period. *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1213 (7th Cir. 1993); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 45253 (7th Cir. 1990).

So the panel's decision puts the squeeze on these plaintiffs, contrary to normal principles of accrual, which do no force you—in fact do not allow you—to sue before you have a claim. If you have been convicted and success on your civil rights claim would undermine your conviction, you have no civil rights claim unless and until you get the conviction set aside. If the search turned up no evidence, or the confession was excluded at the criminal trial, or the other evidence of guilt was overwhelming, the claim does not challenge the conviction and so it accrues at the time of the search. But that is not every case.

The proper response is to adopt a presumption against the unlikely result. (The panel does not discuss that alternative.) The presumption would be that even if the plaintiff's Fourth or Fifth Amendment defense had

prevailed in the criminal proceeding against him, he still would have been convicted, either because the violation had not produced evidence used against him in that proceeding or because, though it had, there was plenty of other evidence to convict him. The presumption would be rebutted if, for example, the only evidence of his guilt was evidence seized in a search that he challenges in his section 1983 suit. This is not a hypothetical case; it is our twin *Okoro* cases, *Okoro v. Bohman*, 164 F.3d 1059, 1061 (7th Cir. 1999), and *Okoro v. Callaghan*, 324 F.3d 488 (7th Cir. 2003). The plaintiff, who had been convicted of a drug offense on the basis of heroin found during a search of his home, brought a federal civil rights suit in which he claimed that he had offered to sell the police jewels (which he claimed they stole from him in response to his offer), not drugs. His conviction was never reversed or otherwise nullified. We held the suit barred by *Heck* because if he was believed he should not have been convicted, since the heroin was essential to the conviction; and so his Fourth Amendment suit for the allegedly stolen jewelry was barred. *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996), is a similar case with the same result.

Another clear case is *Gauger* itself. His conviction, we pointed out, "rested crucially on the statements that he made to the police when he was questioned after being arrested. Earlier we said that he might well have been prosecuted even if his version of the interrogation had been accepted, because his version was incriminating though not as much so as the prosecutors' version. With no statement at all in evidence, however,

he could not have been convicted of guilt of his parents' murder beyond a reasonable doubt; the other evidence—the lack of forced entry or signs of struggle, for example—was probative merely as corroboration of his statements construed as a confession or at least as damaging admissions. So when he showed that the statements were the product of a false arrest and hence were inadmissible at his criminal trial, he successfully impugned the validity of his conviction, as the state implicitly conceded when it dropped the charges against him following the reversal of his conviction." 349 F.3d at 361-62.

There will be tough borderline cases, but the tough cases are not resolved by the decision today. They will simply be fought out as equitable-tolling cases rather than accrual cases—if equitable tolling is available, a question on which the panel, as I noted, reserves judgment: so much for the panel's having adopted a "clear rule." If equitable tolling is unavailable, then Fourth and Fifth Amendment claimants will automatically file within the statutory period dated from the search—and then plead with the district court to disobey *Heck* and not dismiss the suit, even if it is not yet ripe because the conviction has not been set aside and its validity depends on the validity of the search. As the Sixth Circuit sensibly observed in *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 399 (6th Cir. 1999), "just as a convicted prisoner must first seek relief through habeas corpus before his § 1983 action can accrue, so too should the defendant in a criminal proceeding focus on his primary mode of relief—mounting a viable defense

to the charges against him—before turning to a civil claim under § 1983."The panel does not discuss that observation.

The panel denies that it is creating an intercircuit conflict. It says that there is already a conflict and it is just taking sides. Citing five cases, the panel states flatfootedly: "The First, Third, Eighth, Tenth, and Eleventh Circuits have held that false arrest claims accrue at the time of the arrest . . . . By aligning ourselves with one side of this debate, we do not break any new ground." That is incorrect None of those cases hold that such claims *always* accrue at the time of arrest. All they hold is that *normally* a Fourth Amendment claim accrues them. Not one of them even *say s*(as distinct from holds) that it always does, and two of the five explicitly allow for later accrual in exceptional cases.

The five cases are *Nieves v. Sweeney*, 241 F.3d 46, 52-53 (1st Cir. 2001); *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 558 (10th Cir. 1999); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998); *Simmons v. O'Brien*, 77 F.3d 1093, 1097 (8th Cir. 1996), and *Datz v. Kilgore*, 51 F.3d 252, 253 n. 1 (11th Cir. 1995) (per curiam). *Nieves* acknowledges that there may be cases "in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest." 241 F.3d at 52 n. 4. Even the passage that the panel quotes from *Nieves* acknowledges that a section 1983 claim does not always accrue at the time of arrest. *Id. Beck* also acknowledges such a possibility. 195 F.3d

at 558-59. In *Montgomery*, the plaintiff's claims, which were for false arrest and false imprisonment, were unrelated to the outcome of the criminal prosecution against her. Her "claim for false arrest . . . covers damages only for the time of detention until the issuance of process or arraignment, and not more. In addition, Montgomery's section 1983false imprisonment claim relates only to her arrest and the few hours she was detained immediately following her arrest. Montgomery therefore reasonably knew of the injuries that form the basis of these 1983 claims on the night of her arrest." 159 F.3d at 126 (citations omitted).

In *Datz*, a search case, the court held that the plaintiff did not have to wait until the outcome of his criminal case to bring his civil case because it was uncertain whether a ruling in the civil case that Datz's search had been illegal would be inconsistent with his criminal conviction, for "even if the pertinent search did violate the Federal Constitution, Datz' conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error." 51 F.3d at 253 n.1. Since Datz was convicted of being a felon in possession of a firearm, and the firearm was found in the search, it might seem that his conviction could not coexist with invalidating the search. But as the state court that upheld his conviction noted, "ammunition for the weapon also was found in two locations in appellant's house. The police evidence custodian testified appellant contacted him numerous times, by phone and in person, seeking return of 'his AR-15 rifle.' " *Datz v. State*, 436 S.E.2d 506, 509 (Ga. App. 1993). If

there is untainted evidence here, the panel's result might well be correct, but there is no discussion of the other evidence in its opinion. In *Simmons* the only issue discussed is whether admission of a coerced confession can be a harmless error; as far as appears, no issue was made of whether the admission of the confession had been harmless. 77 F.3d at 1094-95. The panel does not discuss *Montgomery*, *Datz*, or *Simmons*; its characterization of them (e.g., "finding § 1983 coerced confession claim not barred by *Heck*") is consistent with the principle that the claim *usually* accrues later.

The cases that the panel acknowledges are in conflict with its accrual rule are, besides *Gauger*, *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000); *Shamaeizadeh v. Cunigan*, *supra*, 182 F.3d at 399; *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996), and *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995). The list is incomplete. Mysteriously omitted, without comment, are *Uboh v. Reno*, 141 F.3d 1000, 1006-08 (11th Cir. 1998), and *Woods v. Candela*, 47 F.3d 545, 546 (2d Cir. 1995) (per curiam). *Nieves*, at least, must be added to the list along with *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st cir. 1995), cited in *Nieves*, as well as our decision in *Booker v. Ward*, 94 F.3d 1054, 1056 (7th Cir. 1996), where we said, examining the proceedings in the Illinois courts, "that success on Booker's unlawful arrest claim would not necessarily undermine the validity of his conviction." That's the test, all right. And note that

Beck, one of the cases the panel cites for its rule, expressly declined to reject *Covington*. 195 F.3d at 559 n. 4.

The panel may have been misled by the reference in *Harvey v. Waldron*, *supra*, 210 F.3d at 1015, to "a split in the circuits." The court in *Harvey* mischaracterizes the approach of courts (including itself!) that reject the approach taken by the panel today. It describes them as holding that a Fourth or Fifth Amendment claim *never* accrues until and unless the conviction is vacated. Those courts hold only that such a claim *sometimes* doesn't accrue until then, for example if there is no other evidence to support the conviction besides evidence claimed to have been obtained illegally. So in *Harvey* the court went on to satisfy itself that the evidence alleged to have been illegally seized was essential to Harvey's conviction. *Id.* at 1015-16.

The panel is right that there are two groups of cases. Butthey are consistent. One holds that a Fourth or Fifth Amendment claim accrues at the time of arrest, assuming the conviction does not depend on the evidence alleged to have been illegally seized. The other holds that the claim does not accrue then if the conviction does depend on that evidence.

I count 12 cases to 0 against the panel's approach, with the other three cases (*Montgomery*, *Simmons*, and *Datz*) noncommittal but consistent with the 12. So one-sided a score should give us pause. If there is a compelling practical reason for flouting conventional statute of limitations principles, forging a lonely path,

and creating more work for the Supreme Court, which now faces an intercircuit conflict on a recurrent issue, the panel has not explained what it might be.

In the
United States Court of Appeals
For the Seventh Circuit

No. 04-3949

ANDRE WALLACE,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, KRISTEN KATO and EUGENE ROY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 CV 2296—**Samuel Der-Yeghiayan**, Judge.

JUDGMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

Date: March 8, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANDRE WALLACE,	)	
	)	
Plaintiff,	)	
	)	No. 03 CV 2296
-vs-	)	
	)	*(Judge Der-Yeghiayan)*
CITY OF CHICAGO and	)	
CHICAGO POLICE OFFICERS	)	
KRISTEN KATO and	)	
EUGENE ROY,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the court on Defendant Kristen Roy's ("Roy") and Eugene Kato's ("Kato") motion for summary judgment and on Defendant City of Chicago's ("City") motion to dismiss. For the reasons stated below we grant the motion for summary judgment in part and deny it in part without prejudice and we deny the motion to dismiss without prejudice.

BACKGROUND

On January 19, 1994 Roy and Kato, detectives for the Chicago Police Department, were assigned to investigate the murder of John Herbert Handy ("Handy"). The police reports indicated that Handy had been shot in a building located at 825 N. Lawndale Avenue in Chicago, Illinois. The reports also indicated that Handy was employed as a house sitter for a construction company which was rehabbing the building.

In addition, the police reports indicated that Handy and the proprietor of the construction company had a confrontation with drug dealers near the building prior to the shooting. The killer apparently entered the building through a window in the back of the building, shot Handy with a 9mm weapon three times, and then fled down a gangway along the building.

After learning of the murder, two other officers familiar with the area interviewed witnesses at the scene and witnesses and other informants indicated that Laron Jackson ("Jackson") and Plaintiff Andre Wallace ("Wallace") were dealing drugs at the crime scene on the night of the murder. On January 19, 1996 the police picked up Wallace and Jackson and took them to the police station. Defendants assert that at that point Jackson and Wallace were not under arrest and that they did not ask to go home. Kato and Roy first began interrogating Wallace and Jackson around 9:30 p.m. During the night Jackson eventually told police that Wallace had been working as "security" for the drug dealers on the night of the murder and was carrying a 9mm gun. Jackson also told police that he saw Wallace running down the gangway along the building after he heard shots fired. At 4:15 p.m. the police confronted Wallace with Jackson's statements. The police first discovered that Wallace was only fifteen years old and they called in a youth officer to assist them. At 6:00 a.m. an Assistant State's Attorney was brought in and Wallace signed a written statement waiving his Miranda rights and admitting that he shot Handy three times.

At 6:00 a.m. an Assistant State's Attorney was brought in and Wallace signed a written statement

waiving his Miranda rights and admitting that he shot Handy three times.

At trial Wallace did not argue that he was innocent. Instead, at closing he argued that he killed Handy in self defense and at least during mutual combat arguing that he should be convicted of second degree murder rather than first degree murder. On appeal the appellate court ruled that Wallace had been seized for a significant amount of time prior to his written confession and the court remanded the case to the trial court to determine if the confession was legal. On remand the trial court found the confession to be admissible, but on the second appeal the appellate court ruled that the confession was inadmissible. Subsequently, the Assistant State's Attorney moved to nolle prosequi the charges against Wallace.

Wallace has filed a claim against Defendants pursuant to 42 U.S.C. §1983 ("Section 1983") alleging false imprisonment, excessive force, and unlawful arrest. Wallace also included a false imprisonment claim and a malicious prosecution claim based upon Illinois law. Kato and Roy have filed a motion for summary judgment on all counts and the City has filed a motion to dismiss.

LEGAL STANDARD

Summary judgment is appropriate when the record reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In seeking a grant of summary judgment the moving party must identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the

absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed.R.Civ.P. 56(c)). This initial burden may be satisfied by presenting specific evidence on a particular issue or by pointing out "an absence of evidence to support the non-moving party's case." *Id.* at 325. Once the movant has met this burden, the non-moving party cannot simply rest on the allegations or denials in the pleadings, but, "by affidavits or as otherwise provided for in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A "genuine issue" in the context of a motion for summary judgment is not simply a "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586(1986). Rather, a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000). The court must consider the record as a whole, in a light most favorable to the non-moving party, and draw all reasonable inferences that favor the non-moving party. *Anderson*, 477 U.S. at 255; *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir. 2000).

DISCUSSION

I. False Arrest and Malicious Prosecution Claims

In his answer brief to the instant motions Wallace concedes that a claim for false arrest would be time-barred and therefore contends that he does not assert a claim of false arrest. Therefore, we grant summary judgment on the false arrest claims. In his answer brief

Wallace also admits that his malicious prosecution claims are flawed and should be dismissed with prejudice. Therefore, we grant summary judgment on the malicious prosecution claims.

II. Section 1983 Claims

Defendants argue that Wallace's Section 1983 claims are barred by the statute of limitations. Section 1983 does not expressly provide a statute of limitations period and thus the federal courts are required to adopt the forum state's statute of limitations period for personal injury claims. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). The appropriate statute of limitations period for Section 1983 claims filed in Illinois is two years. 735 ILCS §5/13-202; *Ashafa v. City of Chicago*, 146 F.3d 459, 461 (7th Cir. 1998). It is clear that, except for his denial of a fair trial claim, which we will address below, Wallace's Section 1983 claims are time-barred. Wallace even admits in his answer brief that all of his claims are time barred, except for his state law false imprisonment claim and his federal denial of a fair trial claim. Therefore, we grant summary judgment on all the Section 1983 claims except for Wallace's denial of a fair trial claim.

III. State False Imprisonment Claim

Wallace argues that his false imprisonment claim limitations period was tolled until he was released from prison. Under Illinois law a statute of limitations generally begins to run "when facts exist which authorize the bringing of the cause of action." *Kozasa v. Guardian Elec. Mfg. Co.*, 99 Ill.App.3d 669, 425 N.E.2d 1137, 1141 (1981). Wallace alleges that he was falsely imprisoned beginning on January 19, 1994 and thus at

that time he could have brought his false imprisonment claim. *See Pierce v. Pawelski*, 2000 WL 1847778, at *2 (N.D.Ill. 2000) (holding that false imprisonment claim was time-barred because claim accrued at initial point of alleged false imprisonment). Therefore, we grant summary judgment on the state false imprisonment claim.

IV. Federal Denial of Fair Trial Claim

Wallace claims that he is bringing a federal denial of a fair trial claim. In *Heck v. Humphrey*, the United States Supreme Court held that a Section 1983 "cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." 512 U.S. 477, 489-90 (1994). Defendants did not address this claim directly in their motion for summary judgment because such a claim was not readily apparent from the complaint. It was only in the answer to the instant motions that Wallace made it clear that he is pursuing such a claim in order to avoid the effects of the statute of limitations and it was only in Defendants' reply brief that Defendants were first able to address the claim. Neither of the parties have devoted sufficient briefing regarding this claim. Therefore, we shall deny summary judgment on the federal denial of a fair trial claim because of the liberal notice pleading requirements set forth by the

V. Municipal Liability

The City filed a motion to dismiss. Under federal law, in order to find a municipality liable under Section 1983 the individual defendants must be found liable. *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

Under Illinois law a "local public entity is not liable for any injury resulting from an act or omission of its employee where the employee is not liable. 745 ILCLS 10/2-109. Since, the federal denial of a fair trial claim is still alive this motion to dismiss is premature. However, based upon Defendants' contesting the federal denial of a fair trial claim it appears likely that another motion for summary judgment will be forthcoming and the City's motion to dismiss arguments may be applicable. Therefore, we deny the City's motion to dismiss without prejudice.

CONCLUSION

Based on the foregoing analysis, we grant the motion for summary judgment except for the federal denial of a fair trial claim. We deny the motion for summary judgment on the federal denial of a fair trial claim without prejudice and we deny the motion to dismiss without prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANDRE WALLACE,	)	
	)	
Plaintiff,	)	
	)	No. 03 CV 2296
-vs-	)	
	)	*(Judge Der-Yeghiayan)*
CITY OF CHICAGO and	)	
CHICAGO POLICE OFFICERS	)	
KRISTEN KATO and	)	
EUGENE ROY,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the court on Defendants Kriston Kato's ("Kato") and Eugene Roy's ("Roy") second motion for summary judgment and motion for leave to amend their answer to the amended complaint. For the reasons stated below, we grant the motion for leave to amend the answer and grant the motion for summary judgment in its entirety.

BACKGROUND

On January 19, 1994, Roy and Kato, detectives for the Chicago Police Department, were assigned to investigate the murder of John Herbert Handy ("Handy"). The police reports indicated that Handy had been shot in a building located at 825 N. Lawndale Avenue in Chicago, Illinois. The reports also indicated

that Handy was employed as a house sitter for a construction company which was rehabbing the building. In addition, the police reports indicated that Handy and the proprietor of the construction company had a confrontation with drug dealers near the building prior to the shooting. The killer apparently entered the building through a window in the back of the building, shot Handy with a 9mm weapon three times, and then fled down a gangway along the building.

After learning of the murder, two other officers familiar with the area interviewed witnesses at the scene and witnesses and other informants indicated that Laron Jackson ("Jackson") and Plaintiff Andre Wallace ("Wallace") were dealing drugs at the crime scene on the night of the murder. On January 19, 1996, the police picked up Wallace and Jackson and took them to the police station. Defendants assert that at that point Jackson and Wallace were not under arrest and that they did not ask to go home. Kato and Roy first began interrogating Wallace and Jackson around 9:30 p.m. During the night, Jackson eventually told police that Wallace had been working as "security" for the drug dealers on the night of the murder and was carrying a 9mm gun. Jackson also told police that he saw Wallace running down the gangway along the building after he heard shots fired. At 4:15 p.m. the police confronted Wallace with Jackson's statements. The police first discovered that Wallace was only fifteen years old and they called in a youth officer to assist them. At 6:00 a.m. an Assistant State's Attorney was brought in and Wallace signed a written statement waiving his Miranda rights and admitting that he shot Handy three times.

At trial Wallace did not argue that he was innocent. Instead, at closing he argued that he killed Handy in self defense and at least during mutual combat arguing that he should be convicted of second degree murder rather than first degree murder. On appeal the appellate court ruled that Wallace had been seized for a significant amount of time prior to his written confession and the court remanded the case to the trial court to determine if the confession was legal. On remand the trial court found the confession to be admissible, but on the second appeal the appellate court ruled that the confession was inadmissible. Subsequently, the Assistant State's Attorney moved to nolle prosequi the charges against Wallace.

Wallace brought the instant action and filed a claim against Defendants pursuant to 42 U.S.C. 1983 ("Section 1983") alleging false imprisonment, excessive force, and unlawful arrest. Wallace also included a false imprisonment claim and a malicious prosecution claim based upon Illinois law.

On March 20, 2004, we granted Defendant Katos' and Roy's motion for summary judgment on all claims except, we denied without prejudice the motion for summary judgment on the denial of fair trial claim. We also denied without prejudice the City's motion to dismiss, which was based on the lack of liability on the part of the individual officers. On April 21, 2004, we granted Wallace leave to file an amended complaint. The amended complaint alleges that Wallace was denied a fair trial under the Fourteenth and Fourth Amendments because of Defendants' conduct when Wallace was arrested, inculpatory statements by Wallace that were unlawfully obtained against him, and the

introduction of evidence about his confession at his state trial. Kato and Roy have filed a second motion for summary judgment on all claims.

LEGAL STANDARD

Summary judgment is appropriate when the record reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In seeking a grant of summary judgment the moving party must identify "those portions of 'the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed.R.Civ.P. 56(c)). This initial burden may be satisfied by presenting specific evidence on a particular issue or by pointing out "an absence of evidence to support the non-moving party's case." *Id.* At 325. Once the movant has met this burden, the non-moving party cannot simply rest on the allegations in the pleadings, but, "by affidavits or as otherwise provided for in [Rule 56], must set forth specific facts showing that there is a gen

DISCUSSION

I. Motion to Amend Answer

Defendants have moved to amend their answer to the amended complaint. Wallace objects to the filing of an amended answer and argues that Defendants waived the collateral estoppel defense by not including it in their answer to the amended complaint. Federal Rule of Civil Procedure 8(c) states, "In pleading to a preceding pleading, a party shall set forth affirmatively ... any other matter constituting an avoidance or

affirmative defense." Wallace cites *Castro v. Chicago Hous. Auth.*, 360 F.3d 721, 735 (7th Cir. 2004) in support of its waiver argument. In *Castro*, the district judge denied the defendant's motion for leave to amend its answer to include additional affirmative defenses, emphasizing the lengthy delay due to the defendant's "motion practice" and the defendant's lack of any reasonable excuse for its failure to raise its affirmative defense earlier. *Id.* Although there was some dispute about which party caused the delay, the Seventh Circuit emphasized that "a district court is in a much better position than we to judge the course and progress of cases before it, and [the Seventh Circuit] will defer to the district judge's firsthand knowledge of the cause of delays unless its conclusion strikes [the Seventh Circuit] as completely unreasonable." *Id.*

Like the defendant in Castro, Defendants Kato and Roy have asked this court to amend their original answer to include the affirmative defense of collateral estoppel. However, Kato's and Roy's present request for leave to amend differs significantly from the request denied in Castro. In Castro, the suit was filed on October 21, 1999. *Id.* On April 17, 2000, the defendant filed its first answer containing three affirmative defenses, and in February of 2001, the defendant filed its summary judgment motion which was denied on June 21, 2001. *Id.* Six months later, on December 14, 2001, the defendant filed a motion to tack on additional defenses to its answer. *Id.* Central to the court's denial in Castro was the extraordinary delay between the defendant's answer and its request for leave to amend, which was approximately 18 months, and the defendant's lack of any reasonable

excuse for why it waited so long to assert its additional defenses. *Id.* In contrast, in the instant action Defendants Kato and Roy filed their second motin for summary judgment less than 30 days after filing their answer to the amended complaint and have sought to amend the answer in a timely fashion.

In addition, Defendants were only put on notice that Wallace's pre-trial criminal proceedings might be relevant by Wallace's amended complaint. It was only after receipt of certain pre-trial transcripts relating to the amended complaint that Defendants realized that there were potential collateral estoppel issues. The rationale behind Rule 8(c) is to "avoid surprise and undue prejudice to the plaintiff by providing her notice and the opportunity to demonstrate why the defense should not prevail." *Venters v. City of Delphi,* 123 F.3d 956, 967 (7th Cir. 1997). As with all motions for leave to amend, the district court has the discretion to allow an answer to be amended to assert an affirmative defense not raised at the outset. *Id.*; Fed.R.Civ.P. 15(a). Although a defendant should not be permitted to "ambush a plaintiff with an unexpected defense," if the defendant acts in a timely fashion after the availability of the affirmative defense becomes reasonably apparent, a district court is well within its authority to grant leave to amend. *See Venters,* 123 F.3d at 968 (stating that "appellate courts are not inclined to find a technical failure to comply with Rule 8(c) fatal when the district court has chosen to recognize a belatedly affirmative defense, so long as the record confirms that the plaintiff had adequate notice of the defense and was not deprived of the opportunity to respond.").

Wallace's arguments that he will be prejudiced by allowing Defendants leave to amend their answer are unconvincing. Wallace refers vaguely to some "expense" incurred although this expense is not specified, and even if Wallace could show some minimal expense, it is doubtful that it would amount to the "undue prejudice" necessary for the court to go against its liberal allowance of leaves to amend under 15(a). See Fed.R.Civ.P. 15(a) (stating that "leave shall be freely given when justice so requires"). Plaintiff also argues that leave to amend should be denied because such amendment would be futile. Although futility is a legitimate reason for the district court to deny leave to amend, *Park v. City of Chicago,* 297 F.3d 606, 612-13 (7th Cir. 2002), we do not find Defendants' defense futile and will examine the issue further in our discussion of the merits of their collateral estoppel claim. Finally, we will not penalize Defendants for their difficulties in addressing Wallace's inarticulate allegations in his complaint and amended complaint in this action. It was Wallace's lack of clarity in his first complaint that prevented the court from resolving all issues in the first dispositive motion and required the additional expense and time of the parties and the additional utilization of judicial resources to address the second motion for summary judgment. Therefore, we grant Defendants' motion to amend their answer to the amended complaint.

II. Collateral Estoppel

Defendants argue that Wallace is barred from arguing that his confession was coerced under the doctrine of collateral estoppel. A federal court should generally "accord[ ] preclusive effect to issues decided by state

courts." *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980) (stating that "res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."); 28 U.S.C. 1738. *See also Wilhelm v. County of Milwaukee*, 325 F.3d 843, 846 (7th Cir. 2003) (stating that "[u]nder 28 U.S.C. 1738, federal courts must give a state court judgment the same preclusive effect that it would receive under state law.").

Under Illinois law for the doctrine of collateral estoppel a defendant must show that: "(1) the issue decided in the prior adjudication is identical with the one presented in the suit in question; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom the estoppel is asserted was a party or in privity with a party to the prior adjudication. *Bajwa v. Metropolitan Life Ins. Co.*, 208 Ill.2d 414, 804 N.E.2d 519, 532 (004). Since the doctrine of collateral estoppel is an equitable doctrine, "collateral estoppel must not be applied to preclude parties from presenting their claims or defenses unless it is clear that no unfairness results to the party being estopped." *Id.*

Illinois courts have found that a ruling on a defendant's motion to suppress in a criminal trial has a preclusive effect on a later case. *See e.g. People v. Owens*, 102 Ill.2d 145, 464 N.E.2d 252, 255 (1984) (affirming lower court's ruling estopping inmate from arguing his confession should have been suppressed because the matter was decided in a motion to suppress hearing in the trial court); *People v. Miller*, 124

Ill.App.3d 620, 464 N.E.2d 1197, 1199 (1984) (stating that "[i]t is well established in Illinois that a defendant may not repeatedly relitigate a pretrial motion to suppress" unless there is additional evidence or peculiar circumstances warranting reconsideration, but merely discovering a new argument is not sufficient.).

Wallace argues that issues involved in the motion to suppress ruling ought to be relitigated because the case fits into the "peculiar circumstances" exception to collateral estoppel. *See People v. Hopkins*, 52 Ill.2d 1, 284 N.E.2d 283, 285 (1972) (stating that peculiar circumstances which might limit how collateral estoppel can be used against a defendant in a criminal case might include the "variety of reasons [the criminal defendant] might not wish to appeal" or additional evidence.). Wallace has not given a sufficient reason for his failure to appeal the motion to suppress ruling. According to Wallace, if Defendants had raised the collateral estoppel defense in their original answer, Wallace would have had more time to gather evidence, he could provide the rationale for his criminal appellate attorney's choice not to raise the voluntariness of his confession on appeal. (Ans., par. 10). However, it was due to Wallace's inarticulate pleading and his vague references to his claims that reasonably prevented Defendants from raising the defense sooner. Absent the lack of clarity in Wallace's pleadings this issue would have been addressed long ago. Wallace has not shown the existence of any peculiar circumstances that fall within the collateral estoppel exception. *See People v. Mordican*, 64 Ill.2d 257, 356 N.E.2d 71, 73-74 (1976) (stating that when the defendant was acquitted, he had no opportunity for appellate

review of the trial court's denial of his motion to suppress evidence and that his case fit into the "peculiar circumstances" exception defined by People v. Hopkins and collateral estoppel could not be used against him).

Hopkins and Mordican, are both distinguishable from the instant case because they involve criminal prosecutions where the state was trying to prevent a criminal defendant from putting on an aspect of his defense by invoking collateral estoppel. 284 N.E.2d at 284, 356 N.E.2d at 72-73. The rationale underlying the "peculiar circumstances exception" adopted by the court in Hopkins is drawn from Justice Burger's dissent in *Ashe v. Swenson.* 397 U.S. 436 (1970). In his dissent, Justice Burger points out that the traditional policy rationales for applying collateral estoppel in civil cases, conservation of judicial resources and providing finality to plan for the future, are necessarily of less importance in a criminal trial. *Id.* at 464.

The Northern District of Illinois considered a case factually similar to the instant case in *Thomson v. Mueller,* 976 F.Supp. 762 (N.D.Ill. 1997). In *Thompson,* the defendant was arrested and charged with aggravated battery and resisting arrest. *Id.* at 763. As part of his defense, he filed a motion to quash the arrest claiming the officers lacked probable cause. *id.* The judge concluded there was probable cause and the motion to quash the arrest was denied, but the defendant was acquitted on other grounds. *Id.* The defendant then filed an eight-count complaint in federal court against the arresting officers and the municipality alleging a false arrest, false imprisonment, malicious prosecution and excessive force brought pursuant to 42

U.S.C. §1983 and §1988, as well as state claims. *Id.* In the federal action the defendant sought summary judgment on the false arrest, false imprisonment and malicious prosecution claims, arguing that probable cause is an absolute bar to such claims and since the state judge already concluded that probable cause existed the plaintiff was barred from presenting the claim under the doctrine of collateral estoppel. *Id.* at 464. The district court granted the motion for summary judgment finding that Thompson was collaterally estopped from challenging the state judge's determination. *Id.* at 765-66.

The court in *Thompson* indicated that peculiar circumstances exist "if there was no possibility of an appeal" or the "party against whom the prior decision is invoked did not have a full and fair opportunity to litigate...." *Id.* at 765. In *Thompson* the court noted that the issue of probable cause was "thoroughly litigated", consisting of two days worth of testimony and multiple briefs, and was based on the judge's assessment of witness credibility (making the appeal unlikely). *Id.* at 766. Since the plaintiff already had a chance to thoroughly litigate his probable cause claim, and his appeal would have been highly unlikely to succeed had he been allowed to appeal the judge's finding, the court in *Thompson* held that it would not be unjust to find collateral estoppel barring the plaintiff from relitigating the issues from the probable cause hearing in his civil case. *Id.*; *James v. Conception*, 1998 WL 729757 *5 (N.D. 1998) (stating that the courts use case-by-case approach from *Thompson*, and finds that although civil plaintiff did not have the ability to appeal, the pretrial probable cause hearing in his

criminal case was sufficiently thorough, and his appeal had a sufficiently low likelihood of succeeding, that collateral estoppel did apply).

Wallace asks this court to apply the "peculiar circumstances" exception to collateral estoppel to this case, and to allow Wallace to relitigate the substance of his motion to suppress in the instant civil case. However, the instant case is a civil action rather than a criminal action. In addition, Wallace already had a chance to thoroughly litigate the issues raised in his motion to suppress his confession, and unlike the plaintiff in Thompson, Wallace was given the opportunity to appeal his suppressed confession, but chose not to do so.

During Wallace's criminal trial, he filed a motion to suppress evidence which alleged that his confession was coerced, and was based on the same evidence of physical and mental abuse stated in Wallace's civil complaint presently before this court. (Amended Compl. par. 5). Wallace admits, pursuant to Local Rule 56.1, that in his motion to suppress, Wallace alleged the same physical and psychological abuse Plaintiff alleges in his present amended complaint. (R SF 47-53). Wallace's allegation that Defendants Roy and Kato's physical and psychological coercion led to his confession in violation of the Fifth Amendment was the center of his motion to suppress. Wallace was afforded an extensive hearing on his motion, spanning four days, involving testimony from Wallace himself and from nine witnesses and arguments from the parties. (R SF 46-53). The trial court denied Wallace's motion to suppress his confession based on coercion. (R SF 55). While true that the trial court judge did not

articulate the rationale for his denial of Wallace's motion to suppress, it is clear that if the judge had found Wallace's evidence of abuse by Kato and Roy to be credible, he would have granted the motion to suppress the confession. *See Williams v. Valtierra*, 2001 WL 1263495, *2 (N.D.Ill.2001) (stating that although the state court judge did not issue an opinion stating his reasons for denying the plaintiff's motion to suppress in the plaintiff's criminal trial, the judge could not have found that the plaintiff's confession was coerced and failed to suppress his confession, therefore the issue of coercion is precluded in the plaintiff's §1983 civil claim).

Finally, Wallace argues that although the state trial judge denied Wallace's motion to suppress, this denial was not "essential to the final judgment" as there was no "final judgment" in Wallace's case. However, the "final judgment" required in the third prong of the collateral estoppel test is only the final judgment as to the issue the moving party seeks to preclude, not to a final judgment in Wallace's criminal case as a whole. *See id.* (stating that the decision at issue in determining whether there was a "final judgment" is not the ultimate criminal conviction, rather it is the denial of plaintiff's motion to suppress in her criminal case). Roy and Kato have met their burden of showing that collateral estoppel should bar Plaintiff Wallace's Section 1983 claims based upon his coerced confession. Therefore, we grant the motion for summary judgment on the due process claim.

III. Waiver and Time-barred Claims

Defendants argue that Wallace has waived certain claims and that some claims are time-barred. In regards to the first motion for summary judgment before this court, the court granted Roy's and Kato's summary judgment motion on Wallace's Fourth Amendment claims because they were time-barred by a two year statute of limitations applied to all 1983 claims filed in Illinois. *Hildebrandt v. Illinois Dept. of Natural Resources,* 347 F.3d 1014, 1036 (7th Cir. 2003); 735 ILCS 5/13-202. Plaintiff argues that the applicable tolling of the statute of limitations was changed by two Seventh Circuit decisions, *Gauger v. Hendle,* 349 F.3d 354 (7th Cir. 2003) and *Wiley v. City of Chicago,* 361 F.3d 994 (7th Cir.2004), which were decided after Wallace answered Defendants' first motion for summary judgment.

However, Defendants cited *Gauger* in their reply brief to the first motion for summary judgment prior to the court's decision on the first motion for summary judgment. This court fully considered the holding in *Gauger* in making its ruling on the first motion for summary judgment. (W SJ Reply 3). Wallace did not file a motion for reconsideration and by failing to question this court's ruling, even though Wallace has had months to do so, Wallace waived his right to reassert his Fourth Amendment claims in this Amended Complaint.

Also, even if this court did allow Wallace to replead his Fourth Amendment Claims under *Gauger* and *Wiley,* his claims would still be time barred. In *Gauger,* the Seventh Circuit set down the rule that

when a constitutional claim under Section 1983 for false arrest would, if vindicated, undermine a state conviction, the statute of limitations is not tolled until the charges against the defendant are dropped. 349 F.3d at 360-361. The rule is based on *Heck v. Humphrey* in which the Court held that before bringing a civil action connected to a criminal conviction, if the alleged unlawful actions in the civil action "would render [the] conviction or sentence invalid," a plaintiff needs to establish that the conviction has been reversed. 512 U.S. 477, 486-487 (1994).

The false arrest claim in this case is distinguishable from the false arrest claim in *Gauger*. In *Gauger* the plaintiff could not file his Section 1983 false arrest claim until the case against him was dismissed because the disposition of his civil suit would undermine his conviction. 349 F.3d at 354. However, in the instant action Wallace could have filed his false arrest claim after the Appellate Court issued its order on September 21, 1998. Wallace's Section 1983 claim would not have been barred by Heck after the Appellate Court's ruling because the Appellate Court remanded Wallace's case to determine whether his confession was sufficiently attenuated from Wallace's illegal arrest to be admissible. In other words, the court acknowledged the possibility that, even if Wallace was illegally arrested, his conviction could still stand. Therefore, after the Appellate Court ruling, Wallace's potential success on a false arrest claim would not imply the invalidity of his criminal conviction. *See Gauger*, 349 F.3d at 361 (stating that "[w]hat we have rejected is a rule that false-arrest and other Fourth Amendment claims are always premature while the plaintiff still

faces criminal punishment."). Since Wallace filed his Fourth Amendment claim more than four years after it became actionable, it is still time-barred. Therefore, we grant Defendants' motion for summary judgment as to Wallace's Fourth Amendment Section 1983 claims.

IV. Cognizable Denial of Fair Trial Claim

Defendants argue that Wallace does not state a cognizable denial of a fair trial claim. For the reasons explained in *Gauger,* Wallace lacks a cognizable denial of a fair trial claim. Wallace was present during the alleged misconduct by Defendants and thus there was no failure to disclose information to him resulting in an unfair trial. *Id.* at 360. Wallace argues that the holding in *Gauger* is limited to cases containing malicious prosecution claims. However, the court in *Gauger* provides no such limitation. The court explained its rationale in a general sense and did not specifically tie its analysis to a malicious prosecution claim. *Id.* Wallace has not provided any other valid arguments indicating that he has a valid denial of a fair trial claim.

CONCLUSION

Based on the foregoing analysis, we grant Defendants' motion for leave to amend their answer and grant their motion for summary judgment in its entirety.

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No. 05-1240

IN THE

Supreme Court of the United States

ANDRE WALLACE,

Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO and EUGENE ROY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Circuit split on the question when a Fourth Amendment claim for false arrest accrues should be reviewed by this Court.

2. Whether petitioner has waived, many times over, the second question presented by the petition, and whether that issue is premature in this case in any event.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

On January 17, 1994, John Herbert Handy ("Handy") was murdered in a house located at 825 North Lawndale Avenue in the City of Chicago. R. 31 ¶ 7. On January 19, 1994, respondents, Chicago Police Detectives Kristen Kato and Eugene Roy, were assigned to investigate the murder. *Id.* ¶ 5.[1] As part of their investigation, on the evening of January

[1] The caption of the petition contains a typographical error of some sort. The caption of the court of appeals's opinion incorrectly indicates that the City of Chicago was a party to the appeal. Petitioner omitted the City as a defendant when he filed his amended complaint. R. 25; see Brief of Defendants-Appellees at 3, *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006) (No. 04-3949).

19, 1994, Detectives Kato and Roy approached petitioner, Andre Wallace, and brought him to the police station for questioning, where he informed the detectives that he was seventeen years old. *Id.* ¶¶ 18-20, 23-24, Exh. 1 ¶ 5. After questioning petitioner over the course of the evening, and after following up on leads stemming from the interview of petitioner and others, Detectives Kato and Roy confronted petitioner with the statements of other interviewees. *Id.* ¶¶ 24, 26-31, 33. He then informed the detectives that he was fifteen years old, after which they called in a youth officer and an assistant state's attorney. *Id.* ¶¶ 34-35. The assistant state's attorney prepared a handwritten statement, which petitioner signed, admitting to Handy's murder. *Id.* ¶¶ 35-36.

As part of the pretrial proceedings in petitioner's prosecution for murder, he filed two motions to suppress—a motion to quash arrest and suppress evidence, and a motion to suppress statements. R. 33 ¶ 45; R. 37, Exhs. D1 & D2. The motion to quash arrest and suppress evidence contended that his inculpatory statements were inadmissible as the fruit of an unlawful arrest. R. 37, Exh. D2. The motion to suppress statements contended that Detective Kato had employed physical and psychological coercion to obtain petitioner's confession. *Id.* Exh. D1. The Circuit Court of Cook County conducted several days of hearings on the motions and then heard arguments. R. 33 ¶¶ 46-54. The court denied both motions, as well as petitioner's request for reconsideration. *Id.* ¶¶ 55-56.

Petitioner was then tried to the bench. During his trial, he did not argue that he was innocent. Pet. App. 32, 39. Rather, in argument through counsel, petitioner admitted shooting Handy, claiming that he shot Handy in self-defense or, alternatively, in mutual combat, and therefore should be found guilty of only second-degree murder. R. 11, Exh. C ¶ 4; R. 33 ¶ 57; Pet. App. 32, 39. Petitioner was convicted of first-degree murder. R. 11, Exh. C ¶ 4; R. 33 ¶ 57.

On appeal, the Illinois Appellate Court held that at some point after arriving at the police station and before giving his confession, petitioner was involuntarily seized. R. 11, Exh. A; R. 33 ¶ 58. The court remanded for a hearing on whether petitioner's confession was sufficiently attenuated from the unlawful seizure to be admissible. R. 11, Exh. A; R. 33 ¶ 59. Petitioner had not argued that his confession was the product of police coercion, and, accordingly, the appellate court did not review the circuit court's finding that it was not. R. 33 ¶ 59. After an attenuation hearing, the circuit court held that petitioner's confession was admissible, but the appellate court again reversed. R. 11, Exh. B; R. 16 ¶¶ 41-42. The court held that the confession was insufficiently attenuated from the unlawful seizure, and remanded for a new trial without the confession. R. 11, Exh. B. The prosecution then moved to *nolle prosequi* the case against petitioner on April 10, 2002. R. 11, Exh. C ¶ 6; R. 16 ¶ 43.

On April 2, 2003, petitioner filed suit against respondents, and the City of Chicago, alleging a deprivation of his rights under the Fourth and Fourteenth Amendments to the Constitution and seeking redress under 42 U.S.C. 1983. R. 1-1. The complaint also alleged that the detectives had committed the state-law torts of false imprisonment and malicious prosecution. *Ibid.* The district court granted summary judgment in favor of respondents on all claims except for what petitioner called a "federal denial of a fair trial claim." Pet. App. 33-35. That ruling reflected petitioner's concession that his other section 1983 claims were time barred and that his malicious prosecution claim was flawed and should be dismissed with prejudice. *Id.* at 33-34. The court further determined that petitioner's state-law false imprisonment claim was barred by the statute of limitations. *Id.* at 34-35. Because the contours of the fair trial claim were "not readily apparent from the complaint," the court denied the summary judgment motion with respect to that claim without prejudice. *Id.* at 35, 36.

Petitioner then filed an amended complaint against only Detectives Kato and Roy, alleging that they had violated his Fourth and Fourteenth Amendment rights by unlawfully arresting him and coercing a false confession. R. 25. The district court entered summary judgment in favor of the detectives on all claims. Pet. App. 52. The court found that petitioner's Fourth Amendment false arrest claim was waived and time barred, that his coerced confession claim was barred by collateral estoppel because the state court had found his confession to be voluntary, and that his denial of a fair trial claim was not cognizable. *Id.* at 48-52.

The court of appeals affirmed. Pet. App. 2. With respect to petitioner's Fourth Amendment false arrest claim, the court held that the claim accrued at the time of petitioner's arrest and was therefore time barred. *Id.* at 2, 12-14. In so doing, the court overruled inconsistent Seventh Circuit precedent. *Id.* at 2 & n.*, 13. With respect to petitioner's Fourth Amendment coerced confession claim, the court rejected the existence of a "stand-alone 'false confession' claim based on the Fourth Amendment, rather than the Fifth Amendment or the due process clauses." *Id.* at 16-17. Finally, the court rejected petitioner's claim asserting that his allegedly false confession violated his Fourteenth Amendment right to a fair trial. *Id.* at 17-18. Because the opinion overruled an earlier Seventh Circuit decision, the panel circulated it among all active judges of the court, and the majority voted not to hear the case en banc. *Id.* at 2 n.*. One judge dissented from the denial of rehearing en banc. *Id.* at 18-28.

ARGUMENT

Certiorari should be granted on one of the two issues set forth in the first question presented by the petition. It should be denied altogether on petitioner's second question. That question is convoluted, raises issues not decided by the courts below, and is plagued by waiver problems.

1. The first question presented by the petition, which petitioner copies from the dissenting opinion below, raises two separate issues—when a Fourth Amendment claim based on a false arrest accrues and when a Fifth Amendment claim based on a coerced confession accrues. The first issue was litigated by the parties to this case and decided by the courts below. As petitioner represents, the issue has divided the courts of appeals for years. Although we believe the Seventh Circuit reached the correct result, and we do not count up the division among the Circuits the way petitioner does, nevertheless we do agree that the conflict among the Circuits on this recurring issue should be reviewed by this Court.

By contrast, the second issue set forth in the first question was neither litigated nor decided in the courts below. The district court did not rule on the timeliness of petitioner's coerced confession claim, and respondents did not defend the district court's judgment on this basis on appeal. And the court of appeals held that petitioner's coerced confession claim did not exist under the Fourteenth Amendment, but instead was merely an attempt to repackage a time-barred Fourth Amendment claim. Pet. App. 17-18. Accordingly, the assertion in the dissent that the decision below creates a conflict in the Circuits on the accrual of a Fifth Amendment coerced confession claim is incorrect, and petitioner's reliance on the dissent is similarly inappropriate. Respondents therefore urge the Court to reject petitioner's attempt to litigate in this case the issue of the accrual of Fifth Amendment coerced confession claims.

The only issue properly presented in this case is whether a Fourth Amendment claim of unlawful seizure arises at the time of the seizure or later, when the criminal proceedings against the civil rights plaintiff are terminated or a conviction is overturned. Respondents acquiesce in petitioner's request for review of that Fourth Amendment issue, although we will, of course, urge affirmance of the judgment if the Court grants review on that issue.

2. With respect to the second question that petitioner presents in the petition, our position is quite the contrary. Petitioner challenges a point of law that the courts below did not decide, and had no reason to decide—namely, whether a section 1983 litigant alleging a false arrest under the Fourth Amendment may hold police officers liable in damages only for the period of time of their active involvement, from arrest to arraignment, or instead for the entirety of the period from the arrest until the charges were dismissed. Neither the court of appeals nor the district court reached this question. Both courts held that petitioner's Fourth Amendment false arrest claim was time barred, and the measure of damages that would pertain in the event of a successful claim was therefore not presented. This Court typically declines to pass upon questions that the courts below did not resolve. See, *e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001). That rule should be enforced in this case. Indeed, even if the Court grants review on the issue of when Fourth Amendment claims accrue and, further, overturns the Seventh Circuit's accrual holding, the issue of damages still will not be properly presented in this case. As we now explain, petitioner waived the issue, and, moreover, this Court's review would be premature.

a.i. Instead of challenging a damages rule announced by the court of appeals in this case, petitioner challenges earlier rulings of the Seventh Circuit. In *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003), after holding that the plaintiff's Fourth Amendment false arrest claim was timely, the Seventh Circuit determined that his "damages will be limited to the harm that he incurred from the false arrest before he was charged." *Id.* at 363. The court reaffirmed that determination in *Wiley v. City of Chicago*, 361 F.3d 994 (7th Cir.), cert. denied, 543 U.S. 819 (2004), holding that "[t]he scope of [the plaintiff's Fourth Amendment false arrest] claim, should [the plaintiff] prevail on its merits, is limited to the time from his arrest until he was charged." *Id.* at 998. Review of this issue is

waived. Petitioner said not a word about the holdings of *Gauger* and *Wiley* regarding the scope of damages available for Fourth Amendment violations in any of his briefs to the courts below. This Court has made clear its reluctance to review questions that the litigants did not raise in the courts below (see, *e.g.*, *Glover*, 531 U.S. at 205), and that rule as well should be enforced in this case.

Nor did the court of appeals decide this issue, in spite of petitioner's waiver. The court referenced the damages holdings of *Gauger* and *Wiley* only in the context of discussing when a Fourth Amendment claim accrues (Pet. App. 7); but, as we explain, it did not decide, and did not need to decide, whether the damages rule applied to petitioner's case because of its holding that petitioner did not have a timely claim. Petitioner thus may not complain about these holdings now.

ii. And that is not petitioner's only waiver problem. Petitioner explicitly stated in the court below that the theory of his case was not any theory of "continuing seizure," which the court had previously rejected in earlier cases. As the Seventh Circuit explained in *Gauger*, a civil rights plaintiff bringing a Fourth Amendment claim may not recover damages from a police officer for the period subsequent to the bringing of official charges because "the Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions." 349 F.3d at 363. See also *Wiley*, 361 F.3d at 998 ("'[T]he interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects.'") (quoting *Gauger*, 349 F.3d at 363). And in *Wiley*, the court specifically rejected the contention, based upon Justice Ginsburg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994), that a Fourth Amendment violation continues "'so long as [the plaintiff] is bound to appear in court and answer the state's charges.'" *Wiley*, 361 F.3d at 998 (quoting *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring)). In the face of this precedent, petitioner told the

court of appeals that "[t]he continuing Fourth Amendment violation advanced in this case is somewhat different from the 'continuing seizure' theory discussed by Justice Ginsburg in her concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994)." Brief and Short Appendix of Plaintiff-Appellant at 16, *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006) (No. 04-3949) [hereafter "CA7 Wallace Br."]. See also Pet. App. 16 (noting that "Wallace tries to distinguish [his claim] from the 'continuing seizure' theory discussed in Justice Ginsburg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994)"). Instead, according to petitioner, the Fourth Amendment theory that he pressed upon the court of appeals was a "second approach" found in Justice Ginsburg's concurrence that would permit liability on a Fourth Amendment theory based upon a police officer's post-arrest conduct, not upon the initial wrongful seizure. CA7 Wallace Br. 17. Leaving aside whether petitioner is correct in his characterization of Justice Ginsburg's concurrence as containing two different "approaches," he specifically disavowed reliance on her endorsement of "the continuing seizure theory" by explicitly distancing himself from that theory below. Nor did petitioner ask the court of appeals to overrule *Gauger* and *Wiley*. Accordingly, any challenge to the holdings of *Gauger* and *Wiley* on the scope of damages and any argument premised on Justice Ginsburg's continuing seizure theory are unquestionably waived.

iii. Petitioner may not have waived review of what he describes as Justice Ginsburg's "second approach" (CA7 Wallace Br. 17) by failing to present it to the court of appeals, but he has surely waived it in the petition to this Court. Neither the second question nor the accompanying discussion presents that issue any longer.

In the court of appeals, as we explain above, petitioner contended he had an actionable Fourth Amendment claim based on a "second approach" that he also attributed to Justice Ginsburg. CA7 Wallace Br. 17. According to peti-

tioner, his Fourth Amendment claim for unlawful arrest "present[ed] a question that was identified, but not ruled on, in *Gauger*," namely:

> "[Petitioner's] incarceration resulted from the combination of a false arrest with (if his testimony is believed) a false account of his interrogation. If his testimony is believed, therefore, the seizure of his person was from the beginning to the end of his incarceration unreasonable, and shouldn't that bring the allegedly fraudulent account of his interrogation under the Fourth Amendment?"

Id. at 15 (quoting *Gauger*, 349 F.3d at 360). According to petitioner, under the "second approach set out by Justice Ginsburg in her concurring opinion in *Albright*," a police officer is liable for post-arrest conduct that perpetuates a Fourth Amendment violation. *Id.* at 17-18. Thus, in petitioner's view, "the entirety of [his] detention, based as it was on the false confession that was obtained by exploiting the unlawful arrest, was unreasonable under the Fourth Amendment." *Id.* at 15. The court of appeals rejected the existence of a claim based on this theory of the Fourth Amendment. Pet. App. 16-17.

Petitioner abandons review of this aspect of the court of appeals's decision by failing to present it in his petition. It is settled that, as a general matter, this Court will not consider issues not fairly encompassed by the questions presented in the petition. See, *e.g.*, *Glover*, 531 U.S. at 205. See also Sup. Ct. R. 14.1(a). Yet, petitioner's second question asks only for what period of time damages may be recovered "in an action brought under 42 U.S.C. § 1983 for [an] unlawful seizure." The question does not raise the possibility of liability under the Fourth Amendment for a police officer's post-seizure conduct.

At best, the reference in the preamble to the second question to "a confession . . . secured by exploiting the unlawful arrest" seems to presume that such liability exists, but that

does not properly raise the issue for review by this Court. Rather, petitioner confirms that he did not present any question of liability under the Fourth Amendment for post-arrest conduct by his citation to *Brown v. Illinois*, 422 U.S. 590 (1975). That case did not involve post-arrest conduct, but only whether the confession was sufficiently attenuated from the illegal arrest to be admissible as evidence. See *id.* at 602-04. The legality of the methods employed to obtain the confession after the wrongful arrest was not at issue. Thus, petitioner's second question does not raise his "second approach" theory for this Court's review.

Nothing in petitioner's discussion of the second question cures this waiver by suggesting that he is seeking review of his "second approach" theory. Instead, every paragraph in the first several pages of this discussion concerns what petitioner perceives as the unfair "limitation on damages" obtainable in a suit "arising from an unlawful arrest" (*e.g.*, Pet. 11; see also *id.* at 12-14)—not whether a Fourth Amendment claim premised on post-arrest conduct actually exists. Although petitioner then switches gears entirely and raises the issue of the availability of "malicious prosecution damages" (*id.* at 15) on a Fourth Amendment theory, which he defines as "'damages for confinement imposed pursuant to legal process'" (*id.* at 13, 16 (quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994))), this, too, is not the same as whether a police officer may be liable for violating the Fourth Amendment based on his post-arrest conduct.

iv. Perhaps petitioner includes the discussion of malicious prosecution solely to take advantage of what he claims to be a Circuit split on the availability of a section 1983 claim for malicious prosecution under the Fourth Amendment. Pet. 13-14. But leaving aside the accuracy of petitioner's characterization of the holdings of the Circuits, this issue is also waived. Petitioner never forwarded a section 1983 Fourth Amendment malicious prosecution claim in this litigation. He did bring a state-law malicious prosecution claim in his

original complaint (R. 1-1 ¶ 9), but then conceded in his response to respondents' first motion for summary judgment in the district court that he could not state a claim for malicious prosecution because he could not show a favorable termination, as required under that state-law cause of action (R. 17 at 3 & n.4, 7 n.8).[2] The district court accepted this admission and entered summary judgment in favor of respondents on petitioner's malicious prosecution claim. Pet. App. 33-34. He did not re-plead that claim in his amended complaint. Instead, in his response to respondents' second motion for summary judgment, he again conceded that he did "not have a state court malicious prosecution action, because the prosecutor has averred that [petitioner's] case was not dismissed on grounds of innocence." R. 30 at 10. Thus, petitioner has waived any claim for damages based on a malicious prosecution theory.

b.i. Even if the issue of the damages available for a Fourth Amendment violation were not waived, this Court's review is premature. At the outset, of course, the portion of petitioner's confinement for which he can hold the police officers who arrested him liable would be important only in the event that the accrual rule that the court of appeals applied is changed in a manner that renders petitioner's Fourth Amendment claims timely. Otherwise, petitioner has no entitlement to damages at all, and the determination what measure of damages is appropriate for timely Fourth Amendment claims would be wholly advisory and of no benefit to petitioner whatsoever. Beyond that, both of petitioner's Fourth Amendment claims depend, at bottom, on proof that he was falsely arrested. Thus, even if this Court were to change the accrual rule in a manner that favored petitioner, a determination of the applicable measure of damages would still be premature be-

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[2] The prosecutor moved to *nolle prosequi* the case after the Illinois Appellate Court barred the use of petitioner's confession, but not because of any indication that petitioner was innocent. R. 11, Exh. C ¶¶ 6-7.

cause petitioner will not be entitled to damages for either a false arrest or false confession until he succeeds in proving to a fact-finder that he was in fact the victim of a false arrest. Only then will the period for which he is entitled to collect damages become relevant. This Court should save its review of this issue for a case in which it is actually presented.

ii. And petitioner's "second approach" "false confession" theory has yet a third strike against review in this case. This theory is premised on the notion that it is unlawful under the Fourth Amendment for a police officer to exploit an unlawful arrest to coerce a false confession, rendering the entirety of the plaintiff's custody unreasonable under the Fourth Amendment. See CA7 Wallace Br. 15. But in this case there has already been a judicial determination that respondents did not coerce petitioner's confession and that the confession in fact was voluntary. In the state-court criminal proceedings, petitioner moved to suppress the confession relying upon the same allegations of coercion he pleads in his amended complaint in this action. R. 37, Exh. D1; see also R. 25 (petitioner's amended complaint). After conducting extensive hearings, the circuit court denied his motion. R. 33 ¶¶ 46-56. Petitioner did not appeal this determination. *Id.* ¶ 59. Collateral estoppel consequently bars the re-litigation of the voluntariness of his confession in a subsequent action. See Brief of Defendants-Appellees at 35-43, *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006) (No. 04-3949). With the extant judicial determination that petitioner's confession was voluntary, he should not be heard on any claim that respondents wrongfully obtained his confession.

c. Finally, even if petitioner had not waived a section 1983 Fourth Amendment malicious prosecution claim, his admission that he cannot prove that the criminal proceedings terminated in his favor is fatal to that claim under the view of virtually every Circuit that recognizes such a claim. See, *e.g.*, *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir.

2004); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1244 (10th Cir. 2003); *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003); *Uboh v. Reno*, 141 F.3d 1000, 1004 (11th Cir. 1998); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996).[3] There is little doubt that this Court, too, would view favorable termination as crucial to the existence of any section 1983 Fourth Amendment malicious prosecution claim. See *Heck*, 512 U.S. at 484 ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior

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[3] The Eighth Circuit has not set forth the elements of a section 1983 malicious prosecution claim. See *Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001) (stating malicious prosecution would not be actionable under section 1983 unless plaintiff also alleges constitutional injury, but not specifying any other required elements of claim). But there is no reason to believe that it, too, would not require favorable termination. Most, if not all, of the state courts in the Eighth Circuit require favorable termination for malicious prosecution claims. See, *e.g.*, *Nichols v. Harbor Venture, Inc.*, 284 F.3d 857, 861 n.3 (8th Cir. 2002) (applying Missouri law); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (applying Minnesota law); *Dean v. Olibas*, 129 F.3d 1001, 1004 (8th Cir. 1997) (applying Arkansas law); *Heib v. Lehrkamp*, 704 N.W.2d 875, 884 n.8 (S.D. 2005); *Holmes v. Crossroads Joint Venture*, 629 N.W.2d 511, 526 (Neb. 2001); *Richmond v. Haney*, 480 N.W.2d 751, 755 (N.D. 1992). See also *Whalen v. Connelly*, 621 N.W.2d 681, 687-88 (Iowa 2001) (requiring termination of proceeding by acquittal or discharge) (as amended on denial of rehearing).

The Sixth Circuit's cases have not been uniform on the issue whether the cause of action exists. See, *e.g.*, *Thacker v. City of Columbus*, 328 F.3d 244, 258-59 (6th Cir. 2003). The cases recognizing the claim have not fully set forth all the required elements based on their finding that the existence of probable cause alone bars the claim. See, *e.g.*, *id.* at 259. Yet, like the Eighth Circuit, the states within the Sixth Circuit include favorable termination among the elements of a malicious prosecution claim. See, *e.g.*, *Parrish v. Marquis*, 172 S.W.3d 526, 530 (Tenn. 2005); *Matthews v. Blue Cross & Blue Shield of Michigan*, 572 N.W.2d 603, 609-10 (Mich. 1998); *Trussell v. General Motors Corp.*, 559 N.E.2d 732, 734-35 (Ohio 1990); *Farmers Deposit Bank v. Ripato*, 760 S.W.2d 396, 399 (Ky. 1988).

criminal proceeding in favor of the accused."). Given petitioner's concession that he cannot establish favorable termination, a Circuit split on the availability of a Fourth Amendment malicious prosecution claim, assuming *arguendo* that such a split exists, is utterly irrelevant to petitioner's case. Even if the Court were to recognize a section 1983 Fourth Amendment malicious prosecution claim, that cause of action would be of no use to him; and that issue should not form the basis for this Court's decision to grant the petition.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be granted limited to an issue embraced within question one of the petition, namely whether a Fourth Amendment claim of unlawful seizure arises at the time of the seizure or later, when the criminal proceedings against the civil rights plaintiff are terminated or a conviction is overturned. The petition should be denied with respect to question two presented in the petition.

Respectfully submitted,

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No. 05-1240

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE WALLACE,

Petitioner.

v.

CITY OF CHICAGO KRISTEN KATO
AND EUGENE ROY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Introduction

Respondents expressly "acquiesce" in petitioner's request that the Court review the question framed by Judge Posner in his opinion dissenting from the denial of rehearing en banc. (Br. Opp. at 5.) Respondents correctly note that the question of when a Section 1983 action for damages arising out of an unlawful arrest accrues "has divided the courts of appeals for years." (*Id.*) Accordingly, respondents join our prayer that "[c]ertiorari should be granted" (*id.* at 4), to resolve the intercircuit conflict on this important and recurring issue.

As petitioner has already explained, (Pet. 6-7), and as respondents do not dispute, this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), largely controls the answer to this accrual question. *Heck* teaches that if the unlawful arrest claim would "necessarily imply the invalidity" of a conviction, then the Section 1983 claim does not accrue until the conviction has been set aside and there is no longer any possibility of a judgment in the pending criminal prosecution.

Respondents treat the confession component of question one in the petition and the damages issue in question two as independent of the accrual issue which respondents agree warrants this Court's review.[1] They

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1. Respondents assert that the confession component of question one was not raised in the court below. (Br. Opp. at 5.) Respondents acknowledge, however, that petitioner raised a confession claim in the court of appeals (*id.*), and recognize that the Seventh Circuit held that the confession claim should be analyzed under the Fourth Amendment,

are not. These three issues are linked by *Heck*.

As the case reaches this Court, there is no dispute that petitioner was arrested without probable cause, that respondents exploited the unlawful arrest to obtain a confession, that petitioner's conviction was reversed after the state appellate court held that the confession was inadmissible as the tainted fruit of the unlawful arrest, and that, lacking any admissible evidence, the prosecution dismissed all criminal charges. Under the fact specific analysis contemplated by *Heck*, 512 U.S. at 487, the illegality of petitioner's arrest "necessarily impl[ied]" the inadmissibility of his confession, and thereby impugned the validity of any further criminal proceedings, as the prosecution implicitly conceded when it dismissed the criminal case.

Petitioner was incarcerated for eight years as a result of the unlawful arrest before he was freed when the prosecutor dismissed the criminal case. The Seventh Circuit held as a matter of law that a wrongful arrest may only cause the harm of unlawful detention from arrest until arraignment, (Pet. App. 16-17), and that the unlawful arrest could not, under any circumstances, impugn the validity of a criminal conviction (or prosecution). These issues are presented in the two questions in the petition for writ of certiorari.

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and on that basis was time barred. (Pet. App. 17-18.) This issue was thus raised and decided below.

The Court should reject respondents' claims of "waiver" — claims similar to those rejected by the court below. (Pet. App. 6.) Each of the questions raised in the petition for writ of certiorari was presented to and passed upon by the court below and each question is therefore properly considered by this Court. *Virginia Bankshares, Inc. v Sandberg,* 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury,* 500 U.S. 1, 8 (1991). Moreover, even respondents do not contest that the question of what damages may be recovered in a Section 1983 action arising from an unlawful arrest has divided the circuits and this Court. (Pet. at 13-16, discussing circuit split and this Court's separate and conflicting opinions in *Albright v. Oliver,* 510 U.S. 266 (1994).) The Court should therefore grant review of both questions presented.

II. Each Question in the Petition Was Presented to and Passed Upon by the Court of Appeals

Petitioner was incarcerated for eight years because respondents unlawfully arrested him and then exploited the unlawful arrest to persuade petitioner to confess to a crime he had not committed. Petitioner argued in the court below that the entirety of his detention was unreasonable under the Fourth Amendment. (*Wallace v. Kato,* 7th Cir., No. 04-3949, Brief of Appellant at 15.)[2] Respondents answered this argument by asserting

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2. This brief is available at http://www.ca7.uscourts.gov/efn/efns.fwx?submit=showbr&caseno=04-3949&shofile=04-3949_001.pdf, visited on May 27, 2006.

that the damages recoverable in a Section 1983 action that stem from an unlawful arrest must be limited to those "that were incurred between the time of his arrest and the time he was charged." (*Wallace v. Kato,* 7th Cir., No. 04-3949, Brief of Appellee at 28.)[3] To support this argument, respondents relied on the common law limitations for damages sought for "confinement pursuant to legal process." (*Wallace v. Kato,* 7th Cir., No. 04-3949, Brief of Appellee at 13.)

The Seventh Circuit expressly reserved in *Gauger v. Hendle,* 349 F.3d 354, 360 (7th Cir. 2003), the question of whether incarceration that begins with an arrest without probable cause continues to be unreasonable under the Fourth Amendment when the incarceration continues because of a confession that was obtained by exploiting the arrest. The court of appeals resolved this issue in this case, holding that an unreasonable seizure under the Fourth Amendment that starts with an unlawful arrest ends at arraignment. (Pet. App. 16-17.) Under the Seventh Circuit's view of the cause of action that may be brought under Section 1983 to obtain damages for an unlawful arrest, it is immaterial that the arresting officers had exploited the arrest to obtain a confession, even when, as here, the confession is false, and the arrestee is incarcerated for eight years

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3. This brief is available at http://www.ca7.uscourts.gov/efn/efns.fwx?submit=showbr&caseno=04-3949&shofile=04-3949_004.pdf, visited on May 27, 2006.

because of that false confession. The Seventh Circuit held in this case that such post-arrest misconduct did not deprive petitioner of any rights secured by the Fourth Amendment. (Pet. App. 17.)

The explicit rejection by the Seventh Circuit of petitioner's claim that the entirety of his detention was unreasonable under the Fourth Amendment shows that question two in the petition for writ of certiorari was squarely presented to the court below. While, as the Court noted in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), "it should not be surprising" if petitioner's legal arguments are more detailed in this Court than they were in the Court of Appeals, *id.* at 120, this "does not imply that petitioner failed to preserve the issue raised in its petition for certiorari." *Id.* The Court should reject respondents' attempt to exclude from review these important questions about the definition and elements of a Section 1983 action brought after an arrest without probable cause has resulted in eight years of incarceration before the arrestee is released from custody.

III. The Limitations on Damages and the Conflict with *Heck v. Humphrey*, 512 U.S. 477 (1994)

A second reason for granting review of question two in the petition for writ of certiorari is that consideration of the Seventh Circuit's limitation on damages is intertwined with whether its bright line rule of accrual is in conflict with the decision of this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994).

In *Heck v. Humphrey*, the Court held that "when a state prisoner seeks damages in a Section 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the

invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated."[4] 512 U.S. at 487. If, however, "the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.*

By limiting the damages recoverable from an unlawful arrest to compensation for the detention from the time of arrest to the time of arraignment, the Seventh Circuit has defined the cause of action for a violation of the Fourth Amendment to eliminate any possibility that success on a Section 1983 action could

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4. Although *Heck* did not involve claims which would imply the invalidity of a pending criminal prosecution, the courts of appeals have without exception held that when success on a Section 1983 claim "would necessarily imply the invalidity of a conviction in the pending criminal prosecution, such a claim does not accrue so long as the potential for a judgment in the pending criminal prosecution continues to exist." *Washington v. Summerville,* 127 F.3d 552, 556 (7th Cir. 1997). See, e.g., *Covington v. City of New York,* 171 F.3d 117, 124 (2d Cir. 1999); *Smith v. Holtz,* 87 F.3d 108, 112-13 (3d Cir. 1996); *Wolfe v. Perry,* 412 F.3d 707, 714 (6th Cir. 2005); *Harvey v. Waldron,* 210 F.3d 1008, 1014 (9th Cir. 2000); *Beck v. City of Muskogee Police Dept.,* 195 F.3d 553, 557 (10th Cir. 1999).

imply the invalidity of a pending criminal prosecution. Under the Seventh Circuit's limitation on damages, there is no need for a district court to exercise the discretion that the Court contemplated in *Heck:* if damages for an unlawful arrest end at arraignment, then a Section 1983 action seeking damages for an unlawful arrest can never challenge the integrity of a criminal prosecution.

There is no indication in *Heck* that the Court contemplated this restriction on a Section 1983 action seeking damages proximately caused by an unlawful arrest. The Court appeared to assume in *Heck* that an action to recover damages for the "'injury' of being convicted and imprisoned" could be brought after a "conviction has been overturned." *Id.* at 487 n.7.

Review of the Seventh Circuit's formulation of the elements of an action to recover damages for the deprivation of Fourth Amendment rights caused by an unlawful arrest necessarily includes the holding of the court below that the damages proximately caused by an unlawful arrest end at arraignment. The Court should reject respondents' attempt to exclude this issue from its consideration in this case.

IV. The Seventh Circuit's Limitation on Damages Cannot Be Separated from the Accrual Question

Respodents' final attempt to limit review of the elements of a Section 1983 action arising from an unlawful arrest which the police exploit to obtain a false confession is to argue that review is premature even if the Court rejects the Seventh Circuit's bright line tolling rule. (Br. Opp. at 12.) In respondents' view, consideration of any issue about damages should be deferred until and unless petitioner proves that he was

unlawfully arrested.

Respondent's claim of prematurity overlooks the fact that the question of what damages may be recovered for the violation of the Fourth Amendment that begins with an arrest without probable cause is inextricably interwined with the question of whether the Fourth Amendment violation ends at arraignment or ends when the unreasonable seizure ended with petitioner's release from custody and the dismissal of criminal charge. Resolution of this issue cannot be fairly divorced from determination of the accrual question presented by question one in the petition for writ of certiorari.

V. CONCLUSION

For the reasons above stated and those previously advanced, the petition for writ of certiorari should be granted.

May, 2006

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IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE WALLACE

Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO AND EUGENE ROY,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED March 22, 2006
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07/09/03	Motion by individual defendants for summary judgment (Record Item No. 5)
09/26/03	Memorandum by the Detectives Kristen Kato and Eugene Roy in support of their motion for summary judgment (Record Item No. 10)
09/26/03	Local Rule 56.1 statement of facts in support of their motion by the Officers Kristen Kato and Eugene Roy (Record Item No. 11)
09/26/03	Appendix filed by defendants Kristen Kato and Eugene Roy of court transcripts cited in the officers' Local Rule 56.1 statement of facts in support of their motion for summary judgment (Record Item No. 12)
09/30/03	Motion by defendant City of Chicago to dismiss portions of plaintiff's complaint (Record Item No. 14)
10/21/03	Response by plaintiff to defendant's Rule 56 statement (Record Item No. 16)

10/21/03 Memorandum by plaintiff in opposition to motion to dismiss portions of plaintiff's complaint (Record Item No. 17)

11/14/03 Response by detectives Kristen Kato, Eugene Roy to plaintiff's additional facts pursuant to Local Rule 56.1 (Record Item No. 20)

11/14/03 Reply memorandum by the Detectives Kristen Kato, Eugene Roy in support of their motion for summary judgment (Record Item No. 21)

03/30/04 Minute Order of 3/30/04 by Hon. Samuel Der-Yeghiayan: For the reasons stated on the attached memorandum opinion, the Court hereby grants defendants' motion for summary judgment except for the federal denial of a fair trial claim. The federal denial of a fair trial claim is denied without prejudice. Furthermore, the Court denies the defendant City of Chicago's motion to dismiss without prejudice. Status hearing set for 04/21/04 to stand. (Record Item No. 23)

04/21/04 Minute Order of 4/21/04 by Hon. Samuel Der-Yeghiayan: Status hearing held and continued to 07/28/04 at 9:00 a.m. The plaintiff is given until 04/28/04 to file an amended complaint. The defendants are given until 05/28/04 to answer, move or otherwise plead to the plaintiff's amended

complaint. If the defendants move to dismiss, the plaintiff's response is to be filed by 06/18/04 and the defendant's reply is to be filed by 06/25/04. (Record Item No. 24)

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09/27/04	Motion by defendants to supplement their 56.1 statement of facts by submitting exhibit D (Record Item No. 37)
09/30/04	Minute Order of 9/30/04 by Hon. Samuel Der-Yeghiayan: Defendants Kato and Roy's motion to supplement their 56.1 statement of facts by submitting Exhibit D is granted without objection (Record Item No. 39)
10/28/04	Minute Order of 10/28/04 by Hon. Samuel Der-Yeghiayan: Status hearing held on 10/26/04. For the reasons stated in the attached memorandum opinion, Kriston Kato and Eugene Roy's motion

for leave to amend their answer to the amended complaint is granted. Furthermore, Kristen Kato and Eugene Roy's second motion for summary judgment is granted in its entirety. (Record Item No. 40)

10/28/04 Entered judgment (Record Item No. 41)

11/15/04 Notice of appeal by plaintiff Andre Wallace (Record Item No. 42)

No. 1-96-2299
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

ANDRE WALLACE,

Defendant-Appellant.

OPINION

[September 21, 1998]

Justice GALLAGHER delivered the opinion of the court:

Following a bench trial, defendant Andre Wallace was convicted of first degree murder for the shooting death of Herb Handy. The trial court sentenced defendant to serve a term of 26 years in the Illinois Department of Corrections on the first degree murder conviction. Defendant next filed this appeal, asserting: (1) the trial court erred in denying defendant's motion to quash his arrest and suppress statements; (2) the assistant State's Attorney who transcribed defendant's inculpatory statement improperly advised him of his *Miranda* rights; (3) the trial court erred in excluding defense evidence regarding the victim's allegedly violent and aggressive character; (4) the trial court erred in admitting prejudicial hearsay offered into evidence by the State; and (5) defendant's conviction for first degree murder should be reduced to second degree murder because defendant was sufficiently provoked by the victim.

The victim, Herb Handy, was shot and killed on January 17, 1994, at 825 North Lawndale Avenue in Chicago. Handy had been hired by a real estate company to housesit the residence at that address. The police recovered several 9 millimeter shell casings from the murder scene, and another housesitter, Robert Banks, claimed to have encountered the assailant face-to-face after the shooting. On January 19, 1994, Chicago police officers took defendant to the Area 4 police station for questioning regarding Handy's death. On January 20, 1994, defendant was arrested for the murder of Handy. At the time of the murder, defendant was 15 years old.

Conflicting testimony was offered at the hearing on defendant's motion to quash his arrest and suppress statements. Laron Jackson, testifying on behalf of defendant, stated that he and defendant were walking along the 800 block of North Lawndale Street in Chicago at approximately 8 p.m. on January 19, 1994. At that time, several police officers arrived and stopped Jackson and defendant. The police then searched the two young men, handcuffed them, placed them in a police car and drove them to the Area 4 police station at Harrison and Kedzie Streets. Jackson testified that neither he nor defendant was asked to accompany the police to the station. At the police station Jackson and defendant were placed in separate rooms and questioned. Ultimately, police placed both men in a lineup.

Coloia Wilkerson also testified for the defense. She stated that she, too, was picked up, handcuffed, placed in a police car and brought to the Area 4 station on January 19, 1994. She stated that she saw defendant in a holding room while at Area 4. Wilkerson further

testified that, after being held for seven or eight hours at Area 4, she was released between 3 and 4 a.m. on January 20, 1994.

Defendant testified on his own behalf at the hearing. He corroborated Jackson's version of how and when the police took him to the Area 4 station on January 19. After waiting alone in an interview room for approximately 45 minutes, an officer entered the room and began questioning him about the shooting of Handy on January 17, 1994. Roughly 90 minutes after this initial questioning, Chicago police detective Kristen Kato entered the room and began to question defendant. Defendant stated that he asked Kato if he could go home, to which Kato responded that they would have "to wait and see." Subsequently, Kato left defendant alone—locked in the interview room. Kato later returned and proceeded to question defendant "a lot." Defendant testified that he was handcuffed throughout his stay at the police station and that the police denied him the opportunity to make a phone call. Defendant stated that Detective Kato informed him around 9:15 p.m. that defendant was being charged with Handy's murder.

On cross-examination, defendant testified that he informed police he was a juvenile once he discovered he was being charged with murder. He also testified that he was placed in a police lineup some four or five hours after arriving at the police station. On redirect, defendant stated that he was never advised of his rights during the evening of January 19 and early morning hours of January 20. On recross, defendant acknowledged that he was presented with a form advising him of his rights, but only after he made his

inculpatory statement the next day; moreover, defendant claimed that he never read the form and that no one ever read the form to him.

Chicago police detective Eugene Roy testified for the State. Roy said that, around 8 p.m. on January 19, 1994, he and several other police officers obtained the name of defendant and Jackson from unknown individuals engaged in narcotics sales. These unknown individuals indicated to the police that defendant was "working security" for the narcotics operations near the murder scene around the time of the victim's death. Shortly thereafter, Detective Roy, Detective Kato and three other police officers located defendant and Jackson and asked the two young men to accompany them to the police station. Defendant and Jackson agreed, and the two were searched, placed in separate cars and driven to Area 4. Once they arrived at Area 4, defendant and Jackson were placed in separate interview rooms. The room defendant was placed in was locked. Defendant was never handcuffed. When asked, defendant lied to the police regarding his age and claimed to be 17. Although Roy did not consider defendant under arrest, he and Detective Kato advised defendant of his *Miranda* rights. This was done as a precaution, in the event that defendant might make a statement inculpating himself in Handy's homicide.

Roy further testified that defendant told the detectives that, while "working security" on January 17, the night of the murder, he overheard an argument between his cousin and the victim. After his cousin disappeared down a gangway, defendant heard the sound of three or four gunshots. Acting on this information, the detectives left Area 4 around midnight in an attempt to

locate defendant's cousin and other individuals mentioned by defendant in this initial statement. Coloia Wilkerson was one individual mentioned by defendant. Roy and Kato successfully located her and Cedric Smith and brought them to Area 4. When questioned, Ms. Wilkerson gave an account of January 17, 1994, that differed from that given by defendant. The police then confronted Jackson with Wilkerson's statement. Once confronted, Jackson informed police that defendant carried a 9 millimeter pistol while "working security" on the 17th, that defendant got into an argument with Handy, and that defendant disappeared into a gangway near the building where the shooting transpired shortly before gunshots rang out. Defendant was placed in a lineup at about 4 a.m., but the witness, Robert Banks, could not identify anyone. Following the lineup, police once again advised defendant of his *Miranda* rights and then confronted him with the statements of Wilkerson and Jackson. Defendant then made an inculpatory statement to Detectives Roy and Kato. Up until he made this inculpatory statement, defendant was free to go home—despite the fact that he was held in a locked room. Defendant was never informed that he was free to leave.

Several other police officers, including Detective Kristen Kato, also testified for the State and essentially corroborated Detective Roy's testimony. Kato expanded upon Roy's testimony, stating that defendant was placed under arrest at roughly 4:30 a.m. After making his incriminating statement, defendant informed the police that he was only 15 years old. A youth officer, Officer Halko, was contacted and he attempted to corroborate defendant's age. At approximately 6:45

a.m., Assistant State's Attorney Lu Ann Rodi arrived to take defendant's statement. Defendant was yet again informed of his *Miranda* rights, and Assistant State's Attorney Rodi transcribed his statement, which defendant then signed in the presence of Ms. Rodi, Officer Halko and Detective Halko. On cross-examination, Kato testified that the door was not locked when he left defendant alone in the interview room; however, Kato admitted that defendant was not free to move about the Area 4 police station.

After hearing this and other testimony, the trial court denied defendant's motion to quash his arrest and suppress statements. In denying the motion, the trial court specifically found that the defendant voluntarily accompanied the police to the station. This finding was based upon the fact that defendant indicated as much in his written statement. Moreover, when it denied defendant's motion to reconsider, the trial court noted that the locked door on the interview room did not automatically render defendant an arrestee.

The bench trial occurred on April 19, 1996. The State recalled many of the witnesses it had called during the hearing on defendant's motion to quash his arrest and suppress statements. One of these was Assistant State's Attorney Lu Ann Rodi. Ms. Rodi testified that she met with defendant alone and told him that she would talk to him, that she would give him his *Miranda* warnings when the officers returned, and that they "were going to have a statement." She then transcribed the inculpatory statement given by defendant on January 20, 1994. Through Ms. Rodi's testimony, that statement was admitted into evidence. In his written statement, transcribed by Ms. Rodi, defendant

acknowledged that he was apprised of and understood his *Miranda* rights.

Defendant's statement related the following pertinent facts: On the night of the murder defendant was "working security" near 825 North Lawndale while a friend, Shorty C, was selling drugs. Defendant was armed with a fully loaded, black gun. At approximately 8 p.m., the victim came toward the defendant's position and told him to "get away from the house or I will kick your ass." Defendant responded, "You can't tell me what to do," and a verbal confrontation ensued. This argument continued after the victim entered the house on Lawndale, as the victim shouted at defendant through an open, second-story window. The victim challenged defendant to come inside the house. Defendant tried to gain access to the house, but the door was locked. Defendant ultimately climbed through a window toward the rear of the house. After he entered through the window, defendant saw the victim about 15 feet away with a baseball bat. Defendant shot the victim about three times. As he tried to leave the house, defendant saw another man, to whom defendant said, "Get back in that room this is none of yours." When defendant discovered that both doors were locked, he left the house using the window by which he had entered. Upon leaving the house, defendant threw the gun away in the middle of the gangway. He never went back to look for it. Defendant also stated that, when police found him a few days later, he agreed to accompany them to the police station to tell them what he knew about the shooting.

Robert Banks also testified for the State. Banks lived at 825 North Lawndale as well, but on the first

floor. Herb Handy, the victim, lived on the second floor. On the night of the murder, Banks heard the victim come home and go upstairs. He could also hear someone yelling from outside up to the second-floor window. Banks stated that he then heard Handy open a window and yell, among other things, "Come on in, [expletive]," down to the person on the street. The discussion continued for four or five minutes, in Banks' estimation. After the yelling stopped, he saw Handy come downstairs and walk back into the kitchen of the house. Banks then heard a thumping or banging against the wall, followed by gunshots. The thumping sounded like a bat or a stick hitting the wall. Banks jumped up when he heard the gunshots and walked down the hall. He was then confronted by another, unknown man. This other man carried a gun, an automatic, and identified himself as the police; the intruder then instructed Banks to return to his room and lie down on the floor. Banks knew the man was not a police officer and refused to comply. Banks ran upstairs and prepared to jump out the window, but he called for help instead. Meanwhile, the intruder left the way he came in because both doors were locked. In a lineup conducted a few days later, Mr. Banks could not identify anyone as the intruder he saw.

Detective Ralph Vucko testified next. He stated that he and his partner responded to a call of a person shot at 825 North Lawndale on January 17, 1994, at approximately 8:30 in the evening. As he investigated the scene, he noted that the recently fallen snow had been disturbed and that a trail had been made in the snow in the gangway that abutted the south side of the building. The trail led to a partially opened window

near the rear of the house, where the snow had been disturbed on the ledge. Upon entering the house, Detective Vucko went into the room with the partially opened window he had just seen from the outside. In this room, he observed the victim—already dead but warm to the touch—lying on the ground with gunshot wounds to his chest and back and a bat in his hands. The victim was lying about eight feet away from the window. Vucko also discovered three 9 millimeter shell casings on the floor.

Detective Kato testified again at defendant's trial. Kato's trial testimony was consistent with the testimony he gave at the hearing on defendant's motion to quash his arrest and suppress statements.

Both parties stipulated as to evidence regarding the victim's autopsy. This stipulation stated, *inter alia,* that the victim died of multiple gunshot wounds and that the victim tested positive for cocaine.

At the close of the State's evidence, defendant moved for a directed verdict. The trial court denied the motion. Defendant also attempted to introduce evidence that would show the victim's violent and aggressive character, pursuant to *People v. Lynch,* 104 Ill.2d 194, 83 Ill.Dec. 598, 470 N.E.2d 1018 (1984). The trial court disallowed such evidence. Defendant then rested his case. In closing argument, defense counsel asserted that defendant acted in self-defense when he shot Herb Handy because Handy was violent and aggressive, on drugs and armed with a baseball bat. Alternatively, the defense argued that Handy provoked defendant into mutual combat; as a result, defendant was guilty only of second degree murder. The trial court found

defendant guilty of first degree murder and sentenced him to 26 years in the Illinois Department of Corrections.

Defendant's primary argument on appeal is that the trial court erred in denying the motion to quash his arrest and suppress statements. Defendant does not dispute the trial court's finding that he voluntarily accompanied police to the Area 4 police station. Instead, defendant asserts that at some point after he arrived at the Area 4 police station he was illegally detained without probable cause, and the trial court's ruling to the contrary was against the manifest weight of the evidence. We agree and reverse the trial court's order denying defendant's motion to quash his arrest.

A motion to quash arrest and suppress statements presents a trial court with a mixed question of law and fact. *People v. Kidd,* 175 Ill.2d 1, 25, 675 N.E.2d 910, 922 (1997). A reviewing court will not disturb the trial court's ruling on a motion to suppress unless it finds that ruling to be manifestly erroneous. *People v. Oaks,* 169 Ill.2d 409, 447, 662 N.E.2d 1328, 1345 (1996); *People v. Melock,* 149 Ill.2d 423, 599 N.E.2d 941 (1992). This is so because such determinations often require the trial court to resolve conflicts in the facts and weigh the credibility of witnesses. *Oaks,* 169 Ill.2d at 447, 662 N.E.2d at 1345. We acknowledge that the parties presented conflicting testimony at the hearing on the motion to quash. However, this record establishes several undisputed facts. When considering undisputed facts in a motion to suppress, so that neither the facts nor the credibility of witnesses is at issue, appellate courts may conduct a de novo review. *Oaks,* 169 Ill.2d at 447-48, 662 N.E.2d at 1345; *see*

also Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (while findings as to relevant historical facts may be reviewed deferentially, the ultimate determination of probable cause should be reviewed de novo on appeal).

Both the United States and Illinois Constitutions protect an individual from seizure or arrest without probable cause. U.S. Const., amend. IV; Ill. Const.1970, art. I, §6; *People v. Williams,* 164 Ill.2d 1, 645 N.E.2d 844 (1994); *Melock,* 149 Ill.2d at 436, 599 N.E.2d at 946. Illegal detentions for excessive periods, absent probable cause, have also been deemed to violate an individual's constitutional rights. *People v. Walls,* 220 Ill.App.3d 564, 578-79, 581 N.E.2d 264, 273-74 (1991); *see also People v. R.B.,* 232 Ill.App.3d 583, 589, 597 N.E.2d 879, 883 (1992) ("Custodial interrogation on less than probable cause violates the fourth amendment whether or not the technical trappings of a formal arrest existed"). The test for determining whether a suspect has been arrested is whether, in light of the surrounding circumstances, a reasonable, innocent person would have considered himself free to leave. *Williams,* 164 Ill.2d at 11, 645 N.E.2d at 848; *Melock,* 149 Ill.2d at 437, 599 N.E.2d at 946. Additional considerations included in this analysis are the intent of the police officer, the understanding of the suspect, and whether the suspect was told that he was free to leave. *Melock,* 149 Ill.2d at 437, 599 N.E.2d at 946.

In their briefs, both the State and defendant offer the seven-factor analysis that our supreme court has determined should be reserved for fifth amendment compulsion issues. *Melock,* 149 Ill.2d at 432, 599

N.E.2d at 944; *see also In re J.W.*, 274 Ill.App.3d 951, 957, 654 N.E.2d 517, 521-22 (1995) (following *Melock*). Because the case *sub judice* presents a question of fourth amendment "arrest" rather than fifth amendment "custodial interrogation," this court will follow the distinction announced in *Melock* and focus on whether a reasonable person would have considered himself free to leave *J.W.*, 274 Ill.App.3d at 957, 654 N.E.2d at 522.

An examination of the record reveals several undisputed facts: (1) defendant, who was only 15 with no prior arrests, and Jackson were originally stopped on the street by five police officers; (2) defendant and Jackson rode to the Area 4 station in separate cars and were placed in separate interview rooms upon arriving at the police station; (3) defendant remained in the same interview room—with the door closed—from his arrival at the station (roughly 8:30 p.m.) until he made his incriminating statement (at 4:30 a.m. the following morning); (4) police officers apprised defendant of his *Miranda* rights several times; (5) defendant was not free to move about the police station; and (6) defendant was never informed that he was free to leave the station. Moreover, both defendant and Detective Roy testified that the door to defendant's interview room was locked.

After reviewing the aforementioned facts, we can only conclude that a reasonable, innocent person placed in defendant's position would not have felt himself free to leave. The State does not contend that probable cause to arrest defendant existed prior to his inculpatory statement. Even if we accept the trial court's finding that defendant voluntarily accompanied the

police, we believe that defendant's presence at the Area 4 station escalated to an involuntary seizure prior to his formal arrest. *R.B.*, 232 Ill.App.3d at 592, 597 N.E.2d at 885; *Walls*, 220 Ill.App.3d at 579, 581 N.E.2d at 274 (finding it difficult to believe "that citizens typically agree to spend extended periods of time at police stations, kept in small windowless rooms, waiting for the police to conduct their investigations and obtain probable cause for their arrest"). Absent probable cause, the involuntary seizure of defendant constituted a violation of his fourth amendment rights. We therefore find that the ruling of the trial court denying defendant's motion to quash was manifestly erroneous.

In reaching our decision, special weight was given to defendant's age and lack of criminal background at the time of the occurrence. "[C]ourts must be especially cautious in cases involving juveniles because the coerciveness of a situation is thereby enhanced." *People v. Cole*, 168 Ill.App.3d 172, 179, 522 N.E.2d 635, 639 (1988) (16-year-old defendant with no prior experience with the criminal justice system was seized in violation of his fourth amendment rights); *see also R.B.*, 232 Ill.App.3d at 592, 597 N.E.2d at 885 (illegal seizure of a 15-year-old defendant); *J.W.*, 274 Ill.App.3d 951, 654 N.E.2d 517 (1995) (illegal seizure of a 14-year-old defendant). The State fails to cite to any case in which a court determined that a minor, detained in a fashion analogous to defendant's experience, was legally seized. Although defendant failed to inform the police of his true age until after his formal arrest, the fact remains that defendant was a 15-year-old minor throughout his questioning by police.

Of course, a finding that defendant was subject to an illegal arrest does not resolve the question of whether defendant's inculpatory statement was properly admissible at trial. *People v. Barlow*, 273 Ill.App.3d 943, 654 N.E.2d 223 (1995); *Walls*, 220 Ill.App.3d at 579, 581 N.E.2d at 274. "A confession obtained after an illegal arrest may be admissible where it was obtained by means sufficiently distinguishable to be purged of the taint of the illegal arrest." *Barlow*, 273 Ill.App.3d at 952, 654 N.E.2d at 231. The determination of whether a confession was sufficiently attenuated from the illegal arrest hinges upon the following considerations: (1) the temporal proximity between the arrest and the confession; (2) the existence of intervening circumstances; (3) the purpose and flagrancy of the police misconduct; and (4) whether the defendant received *Miranda* warnings. *Barlow*, 273 Ill.App.3d at 952, 654 N.E.2d at 231; *J.W.*, 274 Ill.App.3d at 962-63, 654 N.E.2d at 525. In light of its ruling on defendant's motion to quash his arrest, the trial court never considered the attenuation issue. Remandment for an attenuation hearing is appropriate where the record is not clear enough to allow a reviewing court to make an independent ruling on the matter. *Walls*, 220 Ill.App.3d at 579, 581 N.E.2d at 274 (confrontation of a defendant with statements from other witnesses inculpating that defendant as the shooter may have attenuated a confession from the illegal arrest). Accordingly, we reverse defendant's conviction and remand this cause for a hearing to determine whether defendant's inculpatory statement was sufficiently attenuated from his illegal arrest to warrant its admissibility. *See Barlow*, 273 Ill.App.3d at 953, 654 N.E.2d at 231 (citing cases).

Defendant next argues that Assistant State's Attorney Rodi, who transcribed defendant's inculpatory statement, improperly advised him of his *Miranda* rights. In support of this contention, defendant points to Ms. Rodi's trial testimony in which she stated that she would give defendant his *Miranda* warnings when the officers returned and that they "were going to have a statement." Defendant argues that Ms. Rodi's statement vitiated the effect of any proper *Miranda* warnings and hence rendered the statement involuntary. The State points out (and defendant concedes) that a trial court's ruling that a statement is voluntary will not be disturbed unless that ruling is against the manifest weight of the evidence. *People v. Miller,* 173 Ill.2d 167, 181, 670 N.E.2d 721, 728 (1996). In the present case, ample evidence supported the trial court's conclusion that defendant was apprised of and understood his *Miranda* rights. We reject defendant's second point of error.

Defendant also asserts that the trial court erred in excluding defense evidence regarding the victim's allegedly violent and aggressive character, where such evidence was properly admissible under *Lynch.* "[W]hen the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence, regardless of when he learned of it." *People v. Lynch,* 104 Ill.2d 194, 200, 470 N.E.2d 1018, 1020 (1984). Nevertheless, a decision on the admission of evidence is within the sound discretion of the trial court, and such evidentiary rulings will be upheld absent a clear showing that the court abused its discretion. *People v. Booker,* 274

Ill.App.3d 168, 653 N.E.2d 952 (1995). The evidence here established that the victim was entitled to be inside 825 North Lawndale when defendant climbed through an open window and shot the victim several times, causing his death. In light of this evidence, defendant's self-defense claim was spurious at best and the trial court did not abuse its discretion in excluding the proffered Lynch testimony. Defendant's third challenge on appeal must fail.

Defendant further argues that the trial court erred when it admitted Detective Kato's testimony regarding the steps of his investigation, where that testimony contained prejudicial hearsay. Defendant complains that Kato was permitted to testify as to what Coloia Wilkerson told him and that the alleged hearsay statement of Wilkerson damaged defendant's credibility. The State counters that Wilkerson's out-of-court statement was not offered to prove the truth of the matter asserted and therefore did not constitute hearsay. "A police officer may testify about statements made by others, such as victims or witnesses, when such testimony is not offered to prove the truth of the matter asserted, but is instead used to show the investigative steps taken by the officer leading to the defendant's arrest." *People v. Pulliam*, 176 Ill.2d 261, 274, 680 N.E.2d 343, 350 (1997). We agree with the State and find that Wilkerson's statement was not offered for its truth; as such, the statement was not hearsay and Kato's testimony was entirely proper.

As his final point of error, defendant argues that his conviction for first degree murder should be reduced to second degree murder because the evidence established that defendant had an unreasonable belief that he

needed to use deadly force in self-defense and because the victim seriously provoked defendant. When reviewing a challenge of this sort, the appellate court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present. *People v. Blackwell,* 171 Ill.2d 338, 358, 665 N.E.2d 782, 790 (1996).

In this case, either the presence of a serious provocation or an unreasonable belief in the need for deadly force would constitute a mitigating factor. As support for his claim of serious provocation, defendant points to the harsh and abusive language of the victim. We reject this assertion. "Mere words and gestures, however, are not enough to constitute serious provocation." *Blackwell,* 171 Ill.2d at 358, 665 N.E.2d at 791. Alternatively, defendant argues that he had an unreasonable belief that deadly force was necessary, in light of the fact that the victim carried a baseball bat. The overwhelming evidence presented to the trial court nullified this fact, namely, defendant's trespass onto the crime scene (by climbing through a window) while armed with a 9 millimeter semiautomatic handgun. A rational trier of fact could have found that the suggested mitigating factors were not present. As a result, defendant's fifth and final point of error lacks merit.

In light of the foregoing analysis, we reverse defendant's conviction and remand this case to the trial court for an attenuation hearing regarding defendant's inculpatory statement. Should the trial court find defendant's confession sufficiently attenuated from his illegal arrest, we direct the court to reinstate defendant's conviction. In the alternative, if the trial

court determines that no such attenuation exists to purge the confession from the taint of defendant's illegal arrest, we direct the trial court to suppress the confession and conduct further proceedings consistent with this opinion. *Barlow,* 273 Ill.App.3d at 953, 654 N.E.2d at 231; *J.W.,* 274 Ill.App.3d at 963, 654 N.E.2d at 525.

Reversed and remanded.

SHEILA M. O'BRIEN, P.J., and BUCKLEY, J., concur.

Presiding Justice SHEILA M. O'BRIEN specially concurring.

I concur with the result of the majority but disagree with the majority's analysis that the defendant's presence "escalated" to an involuntary seizure at some undefined time prior to his formal arrest. In this case, once the door to the room containing the defendant was locked, it was objectively true that the defendant was not free to leave and was thus, in custody.

On all other issues, I concur.

No. 1-00-0922
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

ANDRE WALLACE,

Defendant-Appellant.

ORDER

[August 31, 2001]

Following a bench trial, defendant Andre Wallace was convicted of first degree murder and sentenced to 26 years in prison. On appeal, defendant contends that the trial court erred in finding that his inculpatory statement was attenuated from his illegal arrest. Defendant argues that the attenuation rested upon an incriminating statement from Laron Jackson, whose arrest defendant contends was also illegal. Defendant argues that Jackson's statement thus did not constitute an intervening circumstance that could attenuate defendant's confession. Because we agree with defendant, we reverse and remand this case for a new trial.

Defendant was convicted of the January 17, 1994, murder of Herb Handy at 825 North Lawndale Avenue in Chicago. On January 19, Chicago police questioned defendant at the police station. At that time, defendant was 15 years old, The following day, defendant was arrested for Handy's murder.

Defendant moved to quash his arrest and suppress his statement. At the motion hearing, Jackson testified

that at about 8 p.m. on January 19, he and defendant were walking in the 800 block of North Lawndale when police stopped them. Jackson and defendant were searched, handcuffed and driven to the Area 4 police station, where they were placed in separate rooms, questioned and later placed in a lineup.

Defendant offered testimony consistent with Jackson's regarding how he and Jackson were taken to the police station on January 19. Defendant was interviewed about 45 minutes after his arrival at the station and was questioned by Chicago Police Detective Kriston Kato after another 90 minutes. When defendant asked if he could go home, Kato said they would have "to wait and see." Defendant was locked in the interview room and was handcuffed throughout his stay at the police station. He was not allowed to make a phone call. Kato told defendant at about 9:15 p.m. that he was being charged with murdering Handy.

Defendant testified on cross-examination that after he learned he was being charged with murder, he told police that he was a juvenile. He was placed in a lineup four or five hours after arriving at the police station. Defendant testified on redirect examination that he was not advised of his *Miranda* rights until after he made his statement, when he was presented with a form. Defendant stated he did not read the form and that it was not read to him.

Coloia Wilkerson testified that she was also picked up by police on January 19, handcuffed and brought to the Area 4 station, where she was held for seven or eight hours before being released.

For the prosecution, Chicago Police Detective Eugene Roy testified that at about 8 p.m. on January 19, he and other officers learned from sources engaged in narcotics sales that defendant was "working security" for drug transactions near where Handy's murder took place. Roy was also given Jackson's name. Roy, Kato and three other officers located defendant and Jackson, who agreed to accompany them to the station. Defendant was placed in a locked interview room but was not handcuffed. Jackson was placed in a separate interview room. Roy stated that defendant was advised of his *Miranda* rights in the event that he made an inculpatory statement, even though Roy did not consider defendant to be under arrest.

Roy testified that defendant told police that on the night of January 17, he was "working security" when he overheard an argument between his cousin and Handy. After defendant's cousin went down a gangway, defendant heard three or four shots fired. Police located people mentioned in defendant's statement, including Wilkerson, who gave an account of the events different from that of defendant.

Roy testified that police then confronted Jackson, who told them that defendant had a gun on the night of the shooting. Jackson stated that defendant and Handy argued, and defendant disappeared into a gangway near the building where the shooting occurred shortly before shots were fired. Defendant was placed in a lineup but was not identified.

Police again advised defendant of his *Miranda* rights and confronted him with Wilkerson's and Jackson's statements. Defendant was arrested at 4:30

a.m. on January 20. Beginning at about 6:45 a.m., Assistant Cook County State's Attorney Lu Ann Rodi transcribed defendant's statement, in which he confessed to Handy's murder. Defendant was given his *Miranda* rights again before making his statement, which defendant signed.

The trial court denied defendant's motion to quash his arrest, finding that he had voluntarily accompanied the police to the station, as he had acknowledged in his written statement. In addition, the court denied defendant's motion to reconsider. On appeal, this court found the trial court's ruling manifestly erroneous, stating that even if defendant voluntarily went to the station, police lacked probable cause to detain defendant prior to his inculpatory statement. *People v. Wallace*, 299 Ill.App.3d 9, 17-18, 701 N.E.2d 87, 92 (1998) (*Wallace I*). This court further recognized that defendant's statement could be admissible if it was sufficiently attenuated from his illegal arrest; therefore, we reversed defendant's conviction and remanded for an attenuation hearing. *Wallace I*, 299 Ill.App.3d at 18-19, 701 N.E.2d at 93.

At the attenuation hearing. Kato testified that defendant and Jackson agreed to go with Kato, Roy and another detective to Area Four headquarters. At about 8:30 p.m., Kato advised defendant of his rights under *Miranda* and defendant indicated that he understood each right. Kato testified that defendant stated he was 17 years old.

Kato and Roy spoke to Jackson, who was in a separate interview room. Jackson was not handcuffed. Kato advised Jackson of his *Miranda* rights, which he

indicated he understood. Kato testified he thought Jackson said he was 18 years old. Jackson told the officers that at the time of the shooting, he was in the 800 block of North Lawndale and heard gunshots near Chicago Avenue. Jackson said he was near "a dope spot" and was "working security" with Ced.

Defendant told Kato the names of two other people who were "working security" that night. Kato left defendant in the interview room and told him to "knock on the door" if he needed anything. Kato stated that the door was locked. Kato and Roy went back to the 800 block of North Lawndale, located Ced and Wilkerson and brought them to the police station. Kato confronted Jackson with a statement from Wilkerson, and Jackson then implicated defendant in the murder. Jackson stated that defendant had a gun and argued with someone inside 825 North Lawndale. Jackson saw defendant go toward a gangway, heard shots fired and saw defendant emerge from the gangway holding the weapon.

Kato testified that Jackson made this statement at approximately 1:30 a.m. At about 4 a.m., police conducted a lineup viewed by a man who had been inside 825 North Lawndale and briefly saw the gunman inside the house after the shooting. The man did not identify defendant in the lineup.

After the lineup, Kato and Roy again interviewed defendant after advising him of his *Miranda* rights. After being confronted with the statements of Wilkerson and Jackson, defendant gave an inculpatory statement. Defendant also told the officers that he was 15 years old, not 17 years old as he had stated earlier.

Kato testified that Jackson, Wilkerson and Ced were not placed in locked interview rooms.

On cross-examination, Kato stated that from the time defendant was taken to the station until when he appeared in the lineup, defendant was not free to leave. Kato stated on redirect examination that he confronted Jackson with Wilkerson's account of the shooting and questioned defendant about those two statements. On recross, Kato stated that at about 1:45 a.m., Jackson implicated defendant in the shooting. Jackson had been in a locked room since 11 p.m.

The trial court ruled that defendant was in custody without probable cause when he mentioned Wilkerson to police, and that because police questioned Wilkerson based upon information received from defendant while he was unlawfully detained, the court could not consider whether Wilkerson's statements were an intervening factor to attenuate the taint of defendant's illegal detention. The court further held that Jackson was illegally detained "but that his statements regarding [defendant's] actions with respect to the shooting were otherwise voluntary and reliable * * * " Based upon the totality of the circumstances, the court found that an intervening factor of probable cause existed before defendant made his statement to Rodi. In addition, the court stated that Jackson's statements "were not derived from or exploit[ive] of defendant's illegal detention."

On appeal, defendant contends that because Jackson, like defendant, was illegally detained, the trial court erred in finding that the statements Jackson made to police prior to defendant's inculpatory statement

attenuated the taint of defendant's illegal arrest. Defendant argues that the trial court incorrectly relied upon Jackson's statement as an intervening factor that provided the police with probable cause to arrest defendant.

The State initially challenges the trial court's finding that Jackson was illegally detained. The State asserts that Jackson's statement did not result from an illegal detention because he was 18 years old, voluntarily accompanied the officers to the police station, was kept at the station for about five hours and was advised of his *Miranda* rights. The test to determine whether a suspect has been arrested is whether, in light of the surrounding circumstances, a reasonable innocent person would have considered himself free to leave. *People v. Williams,* 164 Ill.2d 1, 11, 645 N.E.2d 844, 848 (1994). This analysis also includes consideration of the intent of the police officer, the understanding of the suspect, and whether the suspect was told that he was free to leave. *People v. Melock,* 149 Ill.2d 423, 437, 599 N.E.2d 941, 946 (1992). We disagree with the State's contention that despite the similar circumstances of Jackson and defendant's detentions, the fact that Jackson was 18 (compared to defendant's age of 15) was sufficient to render Jackson's detention legal. As this court concluded in *Wallace I,* defendant and Jackson were stopped on the street by five police officers and taken to the police station in separate cars. At the attenuation hearing, Kato ultimately acknowledged upon re-cross examination that Jackson was kept in a locked room. Jackson's age of majority does not alter those facts and automatically render his detention legal.

We therefore consider whether Jackson's illegal detention affects the admissibility of defendant's statement. To establish that a defendant's statement was admissible despite his or her illegal arrest, the State must show that the statement was a product of the defendant's free will and was independent of any taint of the illegal arrest. *People v. White,* 117 Ill.2d 194, 222, 512 N.E.2d 677, 687 (1987); *People v. Berry,* 314 Ill.App.3d 1, 15, 731 N.E.2d 853, 865 (2000). In evaluating the admissibility of a statement taken from a defendant who was arrested in violation of the fourth amendment, a court considers the following factors: (1) whether the defendant received any *Miranda* warnings; (2) the time period between the arrest and the statement; (3) the purpose and flagrancy of the official misconduct; and (4) the existence of any intervening circumstances. *Brown v. Illinois,* 422 U.S. 590, 603-04, 45 L. Ed. 2d 416, 427, 95 S. Ct. 2254, 2261-62 (1975). The burden of demonstrating attenuation between the illegal conduct and a defendant's subsequent confession sufficient to render the confession admissible rests upon the State. *Brown,* 422 U.S. at 604, 95 S. Ct. at 2262, 45 L Ed. 2d at 427. In the case at bar, defendant was given *Miranda* warnings. Slightly less than 11 hours elapsed between defendant's arrest and his inculpatory statement.

This court has recently recognized that the existence or absence of intervening factors and the conduct of police have emerged as the most relevant factors in the *Brown* analysis. *Berry,* 314 Ill.App.3d at 17, 731 N.E.2d at 866. An intervening circumstance is "one that dissipates the taint of unconstitutional police conduct by breaking the causal connection between the

illegal conduct and the confession." *People v. Turner,* 259 Ill.App.3d 979, 993, 631 N.E.2d 1236, 1245 (1994). The confrontation of an arrestee with information that is untainted by an illegal arrest is an intervening circumstance that can spur a voluntary confession, which would be admissible. *People v. Austin,* 293 Ill.App.3d 784, 788, 688 N.E.2d 740, 743 (1997). Because the facts of this case and the credibility of witnesses are not challenged, this court encounters a question of law, which we review *de novo. People v. Foskey,* 136 Ill.2d 66, 76, 554 N.E.2d 192, 197 (1990).

The State asserts that attenuation was present because Jackson's statement was not causally connected to defendant's illegal arrest. The State maintains that Jackson was brought to the police station as a result of an anonymous tip and not as a result of information provided by defendant and that Jackson implicated defendant after being confronted with Wilkerson's statement. The State argues that those intervening circumstances attenuated defendant's statement from his illegal arrest and provided the police with probable cause to arrest and detain defendant.

The State cites *Berry* and *Austin* in support of its contention that "confronting a suspect with the statement of another suspect or with some other evidence of guilt may serve as an intervening factor that purges the taint of an illegal arrest." We find that those cases differ from the circumstances in the case at bar. In *Berry,* this court held that the defendant's confession provided police with probable cause to detain and question his co-defendant and was an intervening factor to attenuate the co-defendant's confession because the defendant's statement was not the result of an illegal

arrest. *Berry*, 314 Ill.App.3d at 16, 731 N.E.2d at 866. Here, we have concluded that Jackson was illegally detained when he told police of defendant's involvement in the shooting. The facts of Berry are therefore inapposite to those here.

We also fail to see how *Austin* supports the State's position. In *Austin*, the trial court found that an individual's statement that provided authorities with probable cause to arrest the defendant constituted an intervening circumstance to attenuate the defendant's confession. *Austin*, 293 Ill.App.3d at 789, 688 N.E.2d at 743. However, this court reversed and remanded for a new trial, citing precedent that statements obtained in the course of illegal arrests could not attenuate the taint of *another's* illegal arrest. *Austin*, 293 Ill.App.3d at 790-91, 688 N.E.2d at 744-45. In reaching that conclusion, the *Austin* court expressly rejected the analyses employed in two additional cases on which the State relies in this appeal, namely *People v. Lekas*, 155 Ill.App.3d 391, 508 N.E.2d 221 (1987), and *People v. Pierson*, 166 Ill.App.3d 558, 519 N.E.2d 1185 (1988).

Instead, the court in *Austin* expressly relied upon *People v. Bates*, 267 Ill. App. 3d 503, 642 N.E.2d 774 (1994). In *Bates*, the defendant confessed after police confronted him with statements by a co-defendant whose confession had already been found to have been coerced. *Bates*, 267 Ill. App. 3d at 506, 642 N.E.2d at 777. This court held that because the statements by the co-defendant regarding the defendant's involvement in the crime were coerced, they could not be used as an intervening factor to attenuate the taint of the defendant's illegal arrest. *Bates*, 267 Ill.App.3d at 506-07, 642 N.E.2d at 777. The State also cites

People v. Wright, 294 Ill. App. 3d 606, 691 N.E.2d 94 (1998), in support of its contentions. In *Wright,* this court found that the statement of defendant's brother, considered along with the other *Brown* factors, attenuated the taint of defendant's illegal arrest; however, the *Wright* court noted that its analysis would change if the brother's statement "might be said to be tainted by an illegal arrest." *Wright,* 294 Ill.App.3d at 613, 691 N.E.2d at 99.

Such is the case here, since Jackson's detention was illegal. Defendant gave his inculpatory statement after he was confronted with Jackson's statement. Jackson told police that defendant had a gun when he entered a gangway where Jackson heard shots fired. Jackson also stated that defendant exited the gangway holding a gun. Contrary to the State's assertions, the fact that police questioned Wilkerson before interrogating Jackson and gathered additional information prior to defendant's confession does not negate the fact that Jackson's statement was procured during Jackson's own illegal detention after Jackson and defendant were brought to the police station together. Jackson's statement therefore could not properly be used to attenuate the taint of defendant's illegal arrest. *See People v. Beaman,* 255 Ill.App.3d 63, 70, 627 N.E.2d 316, 321 (1993); *People v. Avery,* 180 Ill.App.3d 146, 155-56, 534 N.E.2d 1296, 1302 (1989) (confronting a defendant with statement from another individual who was illegally arrested did not constitute intervening circumstance to attenuate taint of the defendant's illegal arrest).

For the foregoing reasons, the judgment of the trial court is reversed and the case is remanded for a new trial in which defendant's confession must be suppressed.

Reversed and remanded.

GALLAGHER, J., with BUCKLEY and O'BRIEN, JJ., concurring.

No. 05-1240

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IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE WALLACE

Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO AND EUGENE ROY,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER ANDRE WALLACE

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QUESTION PRESENTED

When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?

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No. 05-1240

IN THE
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Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO AND EUGENE ROY,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals (Pet.App. 1-18) and the opinion of Judge Posner dissenting from the denial of rehearing en banc (Pet.App. 19-28) are reported at 440 F.3d 421. The opinions of the district court (Pet.App. 30-36, 37-52) are not officially reported.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court was invoked under 28 U.S.C. §1254 in a petition filed on March 22, 2006. The Court granted the petition on June 19, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Petitioner filed this action under 42 U.S.C. §1983 seeking damages for the eight years he was incarcerated following his arrest in 1994. The core of petitioner's claim is that he was arrested without probable cause and held in custody for eight years because respondents, Chicago police officers, exploited the unlawful arrest to obtain a false confession which was the basis for petitioner's conviction.

Petitioner filed this damage action in 2003 after his conviction had been reversed and criminal charges dismissed. The district court granted summary judgment to respondents, and the court of appeals affirmed, concluding that petitioner's cause of action had accrued when he was arrested in 1994 and was therefore barred by the statute of limitations. Petitioner's claim would be timely if his cause of action accrued when the criminal charges were dismissed in 2002.

1. Arrest and Confession

On January 17, 1994, a man named John Handy was shot and killed in Chicago. (Pet.App. 2.) Two days later, Chicago police officers Roy and Kato, respondents in this Court, came upon petitioner on the street near the scene of the murder. (J.A. 7.) Respondents handcuffed petitioner and and transported him to a police station.[1] (J.A. 9.) Petitioner was only 15 years

1. Petitioner sets out the facts and reasonable inferences in his favor because this case arises from the grant of a motion for summary judgment to respondents. *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004).

of age. (Pet.App. 3.)

Respondents locked petitioner into an "interview room" at the police station. (J.A. 8.) There, petitioner told respondents that he was seventeen years of age, that he was not involved in the Handy homicide, and that he had an alibi. (Sworn Declaration of Andre Wallace, Exhibit 1 to Record Item No. 31, par. 5.)

Throughout the night, respondents interrogated petitioner by playing "good cop/bad cop." (Pet.App. 3.) As the "bad cop," Kato slapped petitioner on his face, (Sworn Declaration, *supra*, par. 14(i)), kicked petitioner on his knee, (Sworn Declaration, *supra*, par. 14(ii)), and squeezed petitioner's testicles. *Id.*

Kato would walk in and out of the interview room during the interrogation and be replaced by respondent Roy, who would plead with petitioner "to confess so that he could stop Kato from hurting me." (Sworn Declaration, *supra*, par. 14(viii).) Roy would leave when Kato returned; Kato would then "yell, threaten, and curse." (Sworn Declaration, *supra*, par. 14(ix).) One of these threats was that if petitioner did not confess to involvement in the Handy homicide, Kato "was going to talk to me with his hands," which petitioner understood to mean that Kato "was going to beat me unless I made a false confession." (Sworn Declaration, *supra*, par. 14(iv).)

The interrogation continued through the night. (Sworn Declaration, *supra*, par. 14(x).) Respondents kept petitioner awake, and did not allow him to use the bathroom. (Sworn Declaration, *supra*, par. 14(xi).) After Kato promised petitioner that he could go home if he confessed (Sworn Declaration, *supra*, par. 14(iv)),

petitioner yielded to the coercive tactics and signed a written incriminatory statement. (J.A. 11.) This confession was false. (Sworn Declaration, *supra*, pars. 7, 14, 14(iv), 14(vii), 14(xii).) Petitioner did not shoot Mr. Handy, (Sworn Declaration, *supra*, par. 11), was not present when Handy was shot, (Sworn Declaration, *supra*, par. 12), and does not know who shot Handy. (Sworn Declaration, *supra*, par. 13.)

Based on the confession, and with no other evidence to corroborate his involvement in the homicide, petitioner was charged with murder and prosecuted as an adult.[2]

2. State Court Proceedings

The state trial judge denied motions challenging the arrest and seeking to suppress petitioner's confession. (J.A. 11.) Petitioner did not present any evidence at a bench trial and was found guilty of murder. (J.A. 14-15.) On direct appeal, the Illinois Appellate Court concluded that plaintiff had been unlawfully arrested, (J.A. 15-19), and remanded the case for an attenuation hearing. *People v. Wallace*, 299 Ill.App.3d 9, 701 N.E.2d 87 (1998) (J.A. 6-23.)

The trial judge reinstated petitioner's conviction on remand, but the Illinois Appellate Court reversed in an unpublished opinion, *People v. Wallace*, 299 Ill.App.3d

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2. A percipient witness who had been "face-to-face" with Handy's assailant, (J.A. 7), did not identify petitioner. (J.A. 10.)

9, 701 N.E.2d 87 (1998), (J.A. 24-35), holding that the confession was the tainted fruit of the unlawful arrest, (J.A. 34), and remanded for a new trial. Review was denied by the Illinois Supreme Court, *People v. Wallace*, 197 Ill.2d 582, 763 N.E.2d 776 (2001) (table). The prosecutor dismissed all charges against petitioner on April 10, 2002. (Pet.App. 4.)

3. Federal Court Proceedings

Petitioner filed this action on April 3, 2003, less than one year after his release, raising several state and federal claims. The district court granted summary judgment to respondents on many of petitioner's claims, (Pet.App. 30-37), and permitted petitioner to file an amended complaint. (J.A. 2.)

Petitioner alleged in his amended complaint that he had been deprived of rights secured by the Fourth and Fourteenth Amendments when he was arrested in 1994 and when testimony about his post-arrest inculpatory statement was used against him at trial. (Record Item No. 25.) The district court granted summary judgment to respondents on these claims. (Pet.App. 38-51.)

A panel of the Seventh Circuit affirmed, holding that petitioner's claims about his arrest and subsequent confession were time barred. (Pet.App. 18.) The panel invoked a circuit rule that permits a panel to reverse a prior decision of the court of appeals by circulating its proposed decision to all active members of the court and inviting a vote on rehearing en banc. (Pet.App. 2 n*.) Using this rule, the panel overruled two of the Seventh Circuit's recent decisions, *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003) and *Wiley v. City of Chicago*, 361 F.3d 994 (7th Cir. 2004), and

adopted a bright line rule that all claims "for false arrest or similar Fourth Amendment violations" accrue at the time of arrest. (Pet.App. 13.) The court of appeals believed its rule was "an arguable extension" of *Heck v. Humphrey*, 512 U.S. 477 (1994), (Pet.App. 12), justified because "a clear accrual rule is superior to a case-by-case rule." (Pet.App. 14.)

Judge Posner wrote a lengthy dissent from the refusal of the court of appeals to re-hear the case en banc, (Pet.App. 19-28), pointing out that the bright line rule adopted by the panel was at odds with *Heck v. Humphrey, supra*, because "a civil rights suit is not a permissible vehicle for a collateral attack on a conviction." (Pet.App. 19.) Judge Posner noted that the panel decision departed from "[e]very other case to address the issue," (Pet.App. 19), and described the panel's rule as "flouting conventional statute of limitations principles," (Pet.App. 27), because it requires a §1983 plaintiff "to sue before you have a claim." (Pet.App. 21.)

SUMMARY OF ARGUMENT

It is by now a "familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality." *New York v. Harris*, 495 U.S. 14, 19 (1990). This rule was applied by the Illinois Appellate Court when it twice reversed petitioner's criminal conviction. Petitioner remained in custody from his arrest on January 19, 1994 until April 10, 2002, when the prosecution, all of its evidence having been suppressed, dismissed the criminal case.

After he was released from custody, petitioner filed this action under 42 U.S.C. §1983, seeking money damages from the officers who had exploited the unlawful arrest to obtain a false confession. The Seventh Circuit held that petitioner's claims were barred by the statute of limitations, concluding that the only §1983 claim which arises from an arrest without probable cause accrues at the time of arrest.

The Seventh Circuit's reading of petitioner's claims is at odds with the plain language of the Fourth Amendment and disregards accepted and ordinary principles of causation: petitioner was subjected to an unreasonable seizure for the eight years that he was held in custody on the tainted fruit of the unlawful arrest; being held in custody was the natural consequence of respondents' actions to exploit the false arrest to secure a confession.

The Court established the appropriate rule of accrual for the claim presented in this case in *Heck v. Humphrey*, 512 U.S. 477 (1994), when it held that a §1983 claim seeking to recover "damages for [an] allegedly unconstitutional conviction or imprisonment" does not accrue until "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87.

The Seventh Circuit's accrual rule is an unwarranted "extension" of the *Heck* rule and is based on the Seventh Circuit's view that §1983 does not provide a remedy "for the 'injury' of being convicted and

imprisoned," *Heck v. Humphrey*, 512 U.S. at 487 n.7, when, as here, a conviction rests on the tainted fruit of an unlawful arrest, that conviction has been overturned on direct appeal, and the §1983 claimant is released from incarceration. (Pet.App. 16-17.) The Seventh Circuit stands alone on these issues and its decision should be reversed.

The rule of accrual advocated by petitioner is consistent with the accrual of a common law action for false imprisonment; the "almost universal rule" is that a claim for false imprisonment accrues on the termination of the imprisonment. Petitioner's rule of accrual is also consistent with the rule adopted by the Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) for accrual of a claim for future damages that may result from an antitrust conspiracy. Finally, petitioner's rule of accrual is also consistent with the rule followed in the majority of the states for accrual of attorney malpractice cases that arise from criminal prosecutions.

The Seventh Circuit stands apart from all other circuits with its view that all false arrest claims accrue at the time of arrest. The Seventh Circuit's rule, if allowed to stand, will result in the needless filing of innumerable false arrest claims, filings necessary to preserve the claims in the event that a conviction is eventually overturned.

The Court should reverse the Seventh Circuit and hold that when a plaintiff in a §1983 action claims that police officers exploited an unlawful arrest to obtain evidence which is the basis for a criminal prosecution, a cause of action for the injury of being convicted and

imprisoned accrues when the criminal charges are resolved in favor of the arrestee.

ARGUMENT

1. Introduction

Respondents, Chicago police officers Cato and Roy, arrested petitioner on January 19, 1994. The officers did not have a reasonable belief that petitioner had committed an offense, and the arrest was an "unreasonable seizure" proscribed by the Fourth Amendment.[3]

Respondents exploited the unlawful arrest to obtain a confession from petitioner: Respondents took the then 15 year old petitioner into custody at about 8:00 p.m. on January 19, 1994 and transported him to a police station. (J.A. 25.) There, instead of providing petitioner with the judicial determination of probable cause required by the Fourth Amendment,[4] respondents misused the warrantless seizure to gather "additional evidence to justify the arrest." *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Respondents

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3. The Fourth Amendment's protection against "unreasonable . . . seizures" includes seizure of the person. *Henry v. United States*, 361 U.S. 98, 100 (1959); *Dunaway v. New York*, 442 U.S. 200 (1979); *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

4. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court held that the Fourth Amendment required that persons arrested without a warrant must receive a post-arrest judicial determination of probable cause.

locked petitioner into an interview room and used "good cop/bad cop" tactics during the all-night interrogation.[5] See *ante* at 4-5. Petitioner made an incriminating oral statement at 4:30 a.m. the next morning, (J.A. 17), and a full, albeit false, confession shortly thereafter, at 6:45 a.m. (J.A. 10.)

Petitioner was incarcerated for more than eight years—from his arrest on January 19, 1994 until he was released from custody on April 10, 2002—because the prosecution relied on a false and unconstitutionally procured confession to obtain an indictment and a conviction. The state appellate court twice reversed petitioner's conviction, holding in the first appeal that petitioner had been unlawfully arrested (J.A. 17-18), and concluding in a second appeal that petitioner's confession was inadmissible because it had been obtained by exploiting the unlawful arrest. (J.A. 34.) Having no admissible evidence, the prosecution dismissed the case.

Since *Monroe v. Pape*, 365 U.S. 167 (1961), it has been settled that 42 U.S.C. §1983 provides a damage

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5. The state trial judge denied petitioner's motion to suppress on voluntariness grounds; petitioner did not challenge this ruling on direct appeal. The district court held that collateral estoppel prohibited petitioner from challenging the voluntariness of the confession. (Pet.App. 43-49.) The court of appeals did not reach this issue. (Pet.App. 18.) The voluntariness of the confession is not before the Court.

remedy for a person who has been subjected to an unreasonable seizure in violation of the Fourth Amendment.[6] The question in this case is whether petitioner's cause of action for the unreasonable seizure accrued when he was arrested in 1994, or when he was released from custody in 2002: Petitioner's §1983 claim is barred by the statute of limitations if his claim accrued in 1994, but timely if the claim accrued in 2002.[7]

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6. The Court held in *Wolf v. Colorado*, 338 U.S. 25 (1949), that the protections of the Fourth Amendment are "implicit in 'the conception of ordered liberty' and as such [are] enforceable against the States through the Due Process Clause." *Id.* at 38. The Court held in *Monroe v. Pape, supra*, that 42 U.S.C. §1983 provides a remedy for violations of the Fourth Amendment against persons who had acted under "color of state law." *Id.* at 187.

7. While federal law determines when a §1983 cause of action accrues, *Heck v. Humphrey*, 512 U.S. 477, 489 (1994), the duration of the statute of limitations for §1983 claims is borrowed from the state's general statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Section 1983 claims arising in Illinois are therefore governed by a two year statute of limitations. *Johnson v. Rivera*, 272 F.3d 519, 521 (7th Cir. 2001).

Tolling of the statute of limitations is determined by state law. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). In Illinois, the statute of limitations on a claim accruing to a person under the age of 18 is tolled until he (or she) attains that age. 735 ILCS 5/13-211. Petitioner became eighteen years of age on November 7,

2. The Rule of Accrual of Heck v. Humphrey and a Cause of Action for the "Injury" of Being Convicted

The Court established a rule of accrual for §1983 actions in *Heck v. Humphrey*, 512 U.S. 477 (1994), holding that a §1983 claim seeking to recover "damages for [an] allegedly unconstitutional conviction or imprisonment" does not accrue until "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87. The Court held that this accrual rule would apply to any §1983 action where success for the claimant "would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487.

The Seventh Circuit held in this case that a successful §1983 action arising out of a false arrest, when the fruits of the arrest had been introduced in the claimant's criminal trial to secure a conviction, can never imply the invalidity of a conviction. (Pet.App. 13.) This holding is compelled by the mistaken view of the court below that §1983 does not provide a remedy "for the 'injury' of being convicted and

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1997. If petitioner's cause of action accrued when he was arrested in 1994, the statute of limitations would have expired on Monday, November 8, 1999, nearly two years before the Illinois Appellate Court reversed petitioner's conviction.

imprisoned," *Heck v. Humphrey*, 512 U.S. at 487 n.7, even when, as in this case, a conviction rests on the tainted fruit of an arrest without probable cause, that conviction has been overturned on direct appeal, and the §1983 claimant is then released from incarceration. (Pet.App. 16-17.) The Seventh Circuit stands alone on these issues and its decision should be reversed.

A. Success on Petitioner's False Arrest Claim Before Dismissal of the Criminal Charges Would Have Necessarily Implied the Invalidity of Any Conviction

All of the evidence available to the prosecution at petitioner's trial was the fruit of his arrest. Before the decision of the Seventh Circuit in this case, the courts of appeals were in agreement that *Heck v. Humphrey* barred petitioner's false arrest claim until his conviction was invalidated because "all the evidence to be presented was obtained as the result of an illegal arrest." *Laurino v. Tate* 220 F.3d 1213, 1217 n.3 (10th Cir. 2000). The universal reading of *Heck* was that cases "where the only evidence supporting the conviction is tainted by a possible constitutional violation that is the subject of a §1983 action—are perhaps the quintessential example of when the *Heck* deferred accrual rule is triggered." *Gibson v. Superintendent of New Jersey Dept. of Law*, 411 F.3d 427, 452 (3d Cir. 2005).

The Seventh Circuit, in *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003), a decision overruled in this case, explained this rule as follows:

> It might be argued that [the civil rights plaintiff] could have sued right after his arrest, even if he might also have waited until his criminal conviction was thrown out. But we do not think that such a

conclusion would be consistent with *Heck*. For he could not knock out the arrest without also (by virtue of *Wong Sun*) invalidating the use in evidence of his admissions, without which, as we have said, he could not be convicted. *Heck*, to repeat, says that a criminal defendant can't sue for damages for violation of his civil rights, if the ground of his suit is inconsistent with his conviction having been constitutional, until he gets the conviction thrown out.

Gauger v. Hendle, 349 F.3d at 362.

Decisions in other circuits are in accord.[8]

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8. First Circuit: *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001) (Fourth Amendment claim involving a "continuing seizure" during the criminal prosecution does not accrue until acquittal).

Second Circuit: *Covington v. City of New York*, 171 F.3d 117, 123 (2d Cir. 1999) ("in a case where the only evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence").

Fourth Circuit: *Ballenger v. Owens*, 352 F.3d 842, 846-47 (4th Cir. 2003) ("If Ballenger succeeds in demonstrating in this §1983 case that his traffic stop was illegal, the illegality of the search would require the suppression of the evidence seized . . . Because a judgment for Ballenger in this case would necessarily imply invalidity of his conviction, the case at this stage amounts to no more than an unexhausted habeas corpus claim that collaterally attacks his conviction.").

Fifth Circuit: *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996) (challenge to arrest barred by *Heck* because

if the "arresting officers lacked probable cause to arrest Hudson for burglary and the arrest is invalid, the firearm discovered in Hudson's possession as a result of the arrest would be subject to suppression under the Fourth Amendment as the "fruit" of an illegal arrest.").

Sixth Circuit: *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 398-99 (6th Cir. 1999) ("Since it appears that the only evidence that was to be introduced against Shamaeizadeh was evidence discovered in Shamaeizadeh's house during the allegedly illegal search, it would not have been possible, while the criminal proceedings against Shamaeizadeh were pending, to determine whether a decision on Shamaeizadeh's claim would imply the invalidity of his potential conviction without deciding issues common to the criminal action—i.e., whether the search was lawful.").

Eighth Circuit: *Anderson v. Franklin County*, 192 F.3d 1125, 1131 (8th Cir. 1999) (because conviction had not been invalidated, "claims of false arrest and imprisonment should be dismissed without prejudice").

Ninth Circuit: *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 1998) ("a §1983 action alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned").

Eleventh Circuit: *Uboh v. Reno*, 141 F.3d 1000, 1006 (11th Cir. 1998) ("[W]here a section 1983 plaintiff is seized following the institution of a prosecution . . . he can properly wait until the prosecution terminates in his favor to bring his section 1983 claim which alleges that the seizure was unreasonable.") (quoting *Whiting v.*

Before the decision of the Seventh Circuit in this case, there was also universal agreement that *Heck* required a district judge to make a fact specific inquiry and "look both to the claims raised under §1983 and to the specific offenses for which the §1983 claimant was convicted." *Hughes v. Lott*, 350 F.3d 1157, 1161 n.2 (11th Cir. 2003). The Seventh Circuit refused to make any fact specific inquiry in this case (Pet.App. 13), relying on its view that the only "injury" that can result from a false arrest occurs when the arrest is made. (Pet.App. 12.) This view is based on an overly narrow view of the protections of the Fourth Amendment and disregards accepted and ordinary principles of causation.

B. Incarceration on the Basis of a Confession Obtained by Exploiting a False Arrest Is a "Continuing Seizure" in Violation of the Fourth Amendment

The Seventh Circuit's holding that the only "injury" which can result from a false arrest occurs at the instant the arrest is made (Pet.App. 12) is based on the view of that court that "the fourth amendment drops out of the picture following a person's initial appearance in court." *Hernandez v. Sheahan*, 455 F.3d 772, ___ (7th Cir., No. 04-2246, July 26, 2006) (slip op. 8.) The Seventh Circuit has consistently held that the Fourth Amendment seizure associated with an arrest ends long before the tainted fruits of the arrest are used to hold the arrestee in custody. *Reed v. City of*

Traylor, 85 F.3d 581, 585-86 (11th cir. 1996)).

Chicago, 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *McCullah v. Gadert*, 344 F.3d 655, 661 (7th Cir. 2003). The Seventh Circuit's view of the scope of the Fourth Amendment is at odds with the decision of this Court in *Albright v. Oliver*, 510 U.S. 266 (1994).

Before the decision of this Court in *Albright*, the Seventh Circuit viewed all §1983 claims concerning post-arrest events as sounding in "substantive due process." The Court of Appeals announced this rule in *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), holding that "once an arrested person is charged but before he is convicted, the question whether the fact, manner, or duration of his continued confinement is unconstitutional passes over from the Fourth Amendment to the due process clause." *Id.* at 193. In choosing to adopt this "substantive due process" standard, the Seventh Circuit rejected "the concept of a continuing seizure" under the Fourth Amendment. *Id.* at 193.

This Court overruled the Seventh Circuit's "substantive due process" approach in *Albright v. Oliver*, 510 U.S. 266 (1994). Although *Albright* was decided without a majority opinion, all members of the Court agreed that Albright's claim of post-arrest restraints should be viewed as a Fourth Amendment violation.

In an opinion joined by three other members of the Court, Chief Justice Rehnquist noted that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it," *id.* at 274, but did not express any view of whether the petitioner's claim was viable under the Fourth Amendment. *Id.* at 275.

Justice Ginsburg, who joined in the plurality opinion, wrote separately to express her view that an arrestee continued to be "seized" under the Fourth Amendment during the pendency of a criminal prosecution, even when released on bail. 510 U.S. at 280. On this view, "[t]he time to file the §1983 action [challenging the arrest] should begin to run . . . upon dismissal of the criminal charges." *Id.*

Justice Kennedy, joined by Justice Thomas, concurred in the judgment, and agreed that the petitioner's "allegation of arrest without probable cause must be analyzed under the Fourth Amendment." 510 U.S. at 281.

Justice Souter, who also concurred in the judgment, wrote separately and noted that the injuries claimed by the petitioner had been held to be "cognizable in §1983 claims founded upon arrests that are bad under the Fourth Amendment."[9] 510 U.S. at 290. Justice Stevens, joined by Justice Blackmun, dissented from the Court's rejection of the substantive due process

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9. The petitioner in *Albright* claimed damages for "limitations on his liberty, freedom of association, and freedom of movement by virtue of the terms of his bond; financial expense of his legal defense; reputational harm among members of the community; inability to transact business or obtain employment in his local area, necessitating relocation to St. Louis; inability to secure credit; and personal pain and suffering." 510 U.S. at 289 (Souter, J., concurring).

argument, and noted agreement with Justice Ginsburg's "explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable." *Id.* at 307.

In its post-*Albright* decisions, the Seventh Circuit has continued to reject the "continuing seizure" rationale, adhering to its pre-*Albright* view that a person stops being "seized" when he (or she) has received a *Gerstein* hearing or been arraigned.[10] *See, e.g., Garcia v. City of Chicago*, 24 F.3d 966, 971 n.6 (7th Cir. 1994) ("the seizure of a person ends after the *Gerstein* hearing); *Lee v. City of Chicago*, 330 F.3d 456, 463 (7th Cir. 2003) (Fourth Amendment inapplicable "when a suspect was already lawfully in custody"); *Gauger v. Hendle*, 349 F.3d 354, 362-63 (7th Cir. 2003) (damages for arrest without probable cause end at filing of formal charges); *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004) (damages for arrest without probable cause end at arraignment).

Judge Posner, the author of the Seventh Circuit's pre-*Albright* rejection of the continuing seizure

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10. The Seventh Circuit explicated its view of *Albright* in *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001), *opinion on denial of rehearing*, 260 F.3d 824 (7th Cir. 2001), concluding that the "effective holding" of *Albright* is "that satisfying the elements of the state-law tort of malicious prosecution . . . *knocks out* any constitutional tort of malicious prosecution." (emphasis in original)

rationale, *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), suggested in *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003) that the court of appeals should revisit its rejection of the continuing seizure approach, noting that the rules applied by the Seventh Circuit would cause the "shocking" result that "a police frame-up which lands a person on death row is not a constitutional tort, though every false arrest made without probable cause is." *Id.* at 360. The Seventh Circuit rejected this suggestion in its decision in this case. (Pet.App. 16-17.)

The Seventh Circuit stands alone in its view that "the fourth amendment drops out of the picture following a person's initial appearance in court." The Courts of Appeals for the Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits have applied the Fourth Amendment to events that occurred after the initial court appearance.[11]

The petitioner in this case was incarcerated for more than eight years because respondents exploited his unlawful arrest to obtain a confession. Petitioner

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11. *Lauro v. Charles*, 219 F.3d 202, 212 (2d Cir. 2000); *DiBella v. Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir. 2005); *Riley v. Dorton*, 115 F.3d 1159, 1161 (4th Cir. 1997); *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000) *Gregory v. City of Louisville*, 444 F.3d 725, 749 (6th Cir. 2006); *Fontana v. Haskin*, 262 F.3d 871, 879 (9th Cir. 2001); *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996).

was "seized" while incarcerated; nothing that occurred at his initial appearance before a judge, at his arraignment, or at his trial relieved him of the restraints of incarceration. Petitioner remained "seized" from his arrest on January 19, 1994 until he was released from custody on April 10, 2002, after the criminal case had been dismissed.

After the criminal charges against petitioner were dismissed, the entirety of his eight years of incarceration is properly viewed as an unreasonable "continuing seizure" that contravened the Fourth Amendment.[12] When petitioner's Fourth Amendment claim is viewed in this manner, "[t]he time to file the §1983 action should begin to run not at the start but at the end of the episode in suit, i.e., upon dismissal of the criminal charges." *Albright v. Oliver*, 510 U.S. 266, 280 (1994) (Ginsburg, J. concurring). The same result would be obtained if accrual of petitioner's Fourth Amendment claim of unconstitutional imprisonment is judged by the standards applicable to a common law action for

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12. *See, e.g., Gallo v. City of Philadelphia*, 161 F.3d 217 222-25 (3d Cir. 1998) (conditions of pre-trial release of criminal defendant were a seizure); *Gregory v. City of Louisville*, 444 F.3d 725, 749 (6th Cir. 2006) ("continued detention without probable cause is an actionable Fourth Amendment injury under §1983"); *Whiting v. Traylor*, 85 F.3d 581, 584 n.4 (11th Cir. 1996) (Fourth Amendment includes "right to be free from an unlawful seizure which is part of a prosecution.").

false arrest and false imprisonment.

3. Lessons from the Common Law

The Court, in construing §1983, has often considered "the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute." *Smith v. Wade*, 461 U.S. 30, 33 (1983). While common law rules may provide an "appropriate starting point," they are not necessarily the "complete solution." *Carey v. Piphus*, 435 U.S. 247, 258 (1978). The common law tort actions for false arrest or false imprisonment serve as an "inspired example," *Hartman v. Moore*, 126 S.Ct. 1695, 1702 (2006), for petitioner's position that a person who is held in custody pending the final adjudication of criminal charges remains "seized" under the Fourth Amendment. The common law rules about the type of damages that could be proximately caused by a malicious prosecution provide an alternative to recognizing a Fourth Amendment violation that continued throughout the eight years that petitioners was incarcerated.

A. False Arrest and False Imprisonment

"False arrest" is "a popular and convenient expression to indicate that an arrest was not lawful and, therefore, whatever harm has been done to the plaintiff not privileged." F. Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 Tex. L. Rev. 157, 162 (1937). "[A] person who is falsely arrested is at the same time falsely imprisoned." *Whirl v. Kern*, 407 F.2d 781, 790 (5th Cir. 1969).

"To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the

person; and, 2. The unlawfulness of such detention."[13] 3 W. Blackstone, *Commentaries on the Laws of England* 127 (1769). The civil remedy for this tort is "an action of trespass, *vi et armis*, usually called an action of false imprisonment." *Id.* at 138.

The "almost universal rule" is that a claim for false imprisonment accrues on the termination of the imprisonment.[14] *Collins v. Los Angeles County*, 241 Cal.App.2d 451, 455, 50 Cal.Rptr. 586, 588 (1966). There, in deciding a question of first impression under California law, the state appellate court canvassed decisions from other jurisdictions and agreed with M.C. Dransfield, Annotation, "When statute of limitations begins to run against action for false imprisonment or false arrest," 49 A.L.R. 2d 922 (1956), that a cause of

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13. See, e.g., *Caperton v. Bowyer*, 81 U.S. 216, 231 (1871) (Plaintiff "alleged that the defendant, on the twenty-ninth of June, 1862, with force and arms, seized the plaintiff and incarcerated him in a dungeon, and imprisoned him there for twenty-four days, separated from his home and family, and that he subjected him to great danger and many hardships, and seriously impaired his health and put him to great pain and distress, both of body and mind.").

14. Cases from jurisdictions which do not follow this rule include *City of Mound Bayou v. Johnson*, 562 So.2d 1212, 1216-1217 (Miss. 1990) (false arrest claim accrues on date of arrest); *Bauer v. Borough of Cliffside Park*, 225 N.J.Super. 38, 47, 541 A.2d 719, 723 (1988) (same).

action for false imprisonment accrues on "the termination of imprisonment." 241 Cal.App.2d at 456, 50 Cal.Rptr. at 589. This rule was applied before the enactment of §1983 and can be fairly said to be "almost universal." 241 Ca.App.2d at 455, 50 Cal.Rptr. at 588.[15]

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15. In *Huggins v. Toller*, 64 Ky (1 Bush) 192, 1867 WL 3888 (1867), the Court of Appeals of Kentucky held that a one-year statute of limitations had not run because "if, as charged, the appellee at first caused the arrest and imprisonment, he was liable for each day such imprisonment was continued, and the statute did not bar the action as to the injury sustained within one year next before the action was commenced." 1867 WL 3888 *3;

See also Kirwan v. State, 31 Conn.Supp. 46, 320 A.2d 837 (1974); *Stanford v. City of Manchester*, 246 Ga.App.129, 539 S.E.2d 845 (2000); *Matovina v. Hult*, 125 Ind.App. 236, 245-46, 123 N.E.2d 893, 898 (1955); *Heron v. Strader*, 361 Md. 258, 761 A.2d 56, 62 (2000) (collecting cases); *Jedzierowski v. Jordan*, 157 Me 352, 172 A.2d 636 (1961); *Nawrocki v. Eberhard Foods, Inc.*, 24 Mich.App. 646, 649, 180 N.W.2d 849, 851 (1970); *Stafford v. Muster*, 582 S.W.2d 670, 680 (Mo. 1979); *Mobley v. Broome*, 248 N.C. 54, 56, 102 S.E.2d 407, 409 (1958), *overruled on unrelated grounds by Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993); *O'Fallon v. Pollard*, 427 N.W.2d 809, 811 (N.D. 1988); *Jackson v. Police Dept. of City of New York*, 500 N.Y.S.2d 553 (N.Y.A.D. 1986); *Belflower v. Blackshere*, 281 P.2d 423 (Okla. 1955); *Adler v. Beverly Hills Hosp.*, 594 S.W.2d 153 (Tex.Civ.App. 1980); *Nave v. City of Seattle*, 68 Wash.2d 721, 723, 415 P.2d 93, 94-95 (1966); *Oosterwyk v. Bucholtz*, 250 Wis. 521, 524, 27 N.W.2d 361, 362 (1947).

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court cited a treatise for the proposition that damages for a false arrest claim "cover the time of detention up until issuance of process or arraignment, but not more." *Id.* at 484, quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 888 (5th ed. 1984). The treatise does not cite any authority to support this proposition, which, while stated in *Allen v. Shed*, 10 Cush (64 Mass.) 375 (1852), appears to reflect a minority view, rather than the "almost universal rule" discussed above, which would allow recovery of damages for post-arraignment imprisonment. See also *Simanton v. Caldbeck*, 96 Vt. 523, 525, 121 A. 411, 412 (1923) (allowing damages for defense of underlying prosecution in false imprisonment action); *Bonesteel v. Bonesteel*, 30 Wis. 511, 1872 WL 3125 *3 (1872) (allowing damages in false imprisonment action for "counsel fee and expenses in procuring his discharge from arrest").

The common law tort of false imprisonment presents a fair analogy to a §1983 action against a police officer who makes a warrantless arrest without probable cause. The gist of each cause of action is unlawful detention; the §1983 action has the additional element that the wrongdoer act under color of law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). In each cause of action, the "background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. 167, 187 (1961), would allow the wrongfully arrested person who was imprisoned for eight years because police officers exploited the unlawful arrest to obtain a confession to file suit upon obtaining his (or her) liberty

and recover damages for the entire period of incarceration. The same result is obtained if petitioner's cause of action is compared to the common law tort of malicious prosecution.

B. Malicious Prosecution

Section 1983 cases seeking damages attributable to an unconstitutional conviction or sentence are often analogized to the common law action of "malicious prosecution." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). This approach is followed by eight circuits.[16]

The focus of the common law tort is on "the improper instigation of a criminal proceeding." 1 F. Harper, F. James, & O. Gray, *The Law of Torts* §4.3 at 6 (2d ed 1986) While this focus may not be helpful in analyzing a §1983 action for damages attributable to an unconstitutional conviction, *Albright v. Oliver*, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J. concurring), other aspects of the common law tort would allow a

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16. See, e.g., *Washington v. County of Rockland*, 373 F.3d 310, 316 (2d Cir. 2004); *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003), opinion following remand, 430 F.3d 140 (3d Cir. 2005); *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000); *Thacker v. City of Columbus*, 328 F.3d 244, 258 (6th Cir. 2003); *Moran v. Clarke*, 296 F.3d 638, 646 (8th Cir. 2002); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069 (9th Cir. 2004); *Grubbs v. Bailes*, 445 F.3d 1275, 1278 (10th Cir. 2006); *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003).

meaningful §1983 remedy even if the Court did not agree that petitioner was seized within the meaning of the Fourth Amendment for the eight years that he was incarcerated. *Cf. Pierce v. Gilchrist*, 359 F.3d 1279, 1285-86 (10th Cir. 2004) ("at some point after arrest, and certainly by the time of trial, constitutional analysis shifts [from the Fourth Amendment] to the Due Process Clause").

The damages that may be obtained in a common law malicious prosecution action are those which were proximately caused by the prosecution. Such damages may include "compensation for loss of time, loss of income, loss of credit, emotional distress, and harm to reputation generally, as well as expenditures made in defending the malicious prosecution." 1 F. Harper, F. James, & O. Gray, *The Law of Torts* §4.7 at 57-58 (2d ed 1986) (citations omitted). These are the type of losses which petitioner incurred during the eight years he was held in custody. The proximate cause of petitioner's imprisonment was respondents' actions to exploit petitioner's unlawful arrest to secure a false confession. It is settled law that such actions contravene the Fourth Amendment. *New York v. Harris*, 495 U.S. 14, 19 (1990).

Section 1983 "creates a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), and, "[l]ike other tort causes of action, it is designed to provide compensation for injuries arising from the violation of legal duties." *City of Monterey v. Del Monte Dunes at Monterey, Ltd*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring). Thus, the police officers who exploited petitioner's unlawful arrest should be responsible for the "natural consequences of [their] actions."

Monroe v. Pape, 365 U.S. 167, 187 (1961).

Another aspect of the common law tort of malicious prosecution is relevant to petitioner's claim: A cause of action for common law malicious prosecution does not accrue until there has been a favorable termination of the criminal proceeding; this, of course, is the accrual rule that the Court adopted in *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

The common law action of malicious prosecution supports petitioner's position that his damage claim did not accrue until the criminal charges had been resolved in his favor. Also supporting petitioner is the accrual rule applied when an antitrust injury results in future damages whose "accrual is speculative or their amount and nature unprovable." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971).

4. The Hazeltine Rule

The accrual question presented in this case is similar to that answered by the Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). There, starting from the general rule that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business," the Court held that when the antitrust injury arises from a continuing conspiracy, a cause of action accrues "each time a plaintiff is injured by an act of the defendants." *Id.* at 338.

After noting that the cause of action accruing from a continuing conspiracy permits the plaintiff to "recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date," 401 U.S. at 339,

the Court turned to the situation where an antitrust injury results in future damages whose "accrual is speculative or their amount and nature unprovable." The Court held that this cause of action "will accrue only on the date they are suffered." *Id.*

The policies which support the *Hazeltine* rule are similar to those underlying §1983. Private antitrust actions serve "as a bulwark of antitrust enforcement." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). Section 1983 actions are "an effective deterrent" to police wrongdoing. *Hudson v. Michigan*, 126 S.Ct. 2159, 2167-68 (2006). The antitrust laws are intended to "protect the victims of the forbidden practices." *Radovich v. National Football League*, 352 U.S. 445, 454 (1957). Section 1983 is intended "to protect the people from unconstitutional action under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972). The Court relied on these policies when it formulated the *Hazeltine* rule, lest "future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery." *Hazeltine*, 401 U.S. at 340.

As applied to this case, *Hazeltine* compels the result that petitioner's claim is not barred by the statute of limitations. Petitioner did not have any damage claim for "the 'injury' of being convicted and imprisoned (until his conviction [was] overturned)." *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994). This injury was incurred on the day that the criminal charges were dismissed. Petitioner filed this action within the two year statute of limitations that applies to §1983 claims in Illinois, see *ante* at 12 n.7, and

respondents' statute of limitations defense should have been overruled.

5. The Rule of Accrual Applied in Attorney Malpractice Cases

The accrual question presented in this case is also similar to that presented in attorney malpractice suits against criminal defense attorneys

The general rule is that a claim of legal malpractice in a criminal case does not accrue "until relief from a conviction is achieved." *Trobaugh v. Sondag*, 668 N.W.2d 577, 583-84 (Iowa 2003). This rule is often referred to as the "exoneration rule," *Canaan v. Bartee*, 276 Kan. 116, 120-31, 72 P.3d 911, 915-21 (2003), and is followed in the majority of jurisdictions which have considered the question.[17] *Robinson v.*

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17. Cases adopting this rule of accrual include: Alaska: *Shaw v. State, Department of Admin.*, 816 P.2d 1358, 1360 (Alaska 1991); Arizona: *Glaze v. Larsen*, 207 Ariz. 26, 32, 83 P.3d 26, 32 (2004); California: *Wiley v. County of San Diego*, 19 Cal.4th 532, 79 Cal.Rptr.2d 672 (1998); Florida: *Cira v. Dillinger*, 903 So.2d 367, 370 (Fla.App. 2005); Illinois: *Paulsen v. Cochran*, 356 Ill.App.3d 354, 358-59, 826 N.E.2d 526, 530 (2005); Kentucky: *Stephens v. Denison*, 150 S.W.3d 80 (Ky.App. 2004); Maryland: *Berringer v. Steele*, 133 Md.App. 442, 484, 758 A.2d 574, 597 (2000); Massachusetts: *Glenn v. Aiken*, 409 Mass. 699, 707-08, 569 N.E.2d 783, 788 (1991); Minnesota: *Noske v. Friedberg*, 656 N.W.2d 409, 413 (Minn.App. 2003); Nevada: *Morgano v. Smith*, 110 Nev. 1025, 1028-29, 879 P.2d 735, 737 (1994); New Hampshire: *Thierrien v. Sullivan*, 891 A.2d 560, 562 (N.H. 2006) (must show

Southerland, 123 P.3d 35, 43 (Okla Civ.App. 2005).

"[A] rule that encouraged the early filing of malpractice suits against counsel unsuccessful at trial would likely have a severe and negative impact on the functioning of the criminal justice system." *Glaze v. Larsen*, 207 Ariz. 26, 32, 83 P.3d 26, 32 (2004). The same is true for the Seventh Circuit's rule of accrual.

6. Dangers of the Seventh Circuit's Rule

The Seventh Circuit's accrual rule violates the principle that a civil action should not be permitted to collaterally attack a criminal conviction. This Court recognized in *Heck* "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. By limiting opportunities for collateral attack, the Court has sought to "prevent[] inconsistent decisions, [thus] encourag[ing] reliance on adjudication." *Oregon v. Guzek*, 126 S.Ct. 1226, 1233 (2006) (quoting *Allen*

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actual innocence); New York: *Britt v. Legal Aid Soc., Inc.*, 95 N.Y.2d 443, 447, 718 N.Y.S. 2d 264, 267 (2000); Oregon: *Stevens v. Bispham*, 316 Or. 221, 238, 851 P.2d 556, 566 (1993); Tennessee: *Gibson v. Trant*, 58 S.W.3d 103, 110 (Tenn. 2001); Texas: *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497-98 (Tex. 1995); Virginia: *Adkins v. Dixon*, 253 Va. 275, 282, 482 S.E.2d 797, 801 (1997); Washington: *Owens v. Harrison*, 120 Wash.App. 909, 913, 86 P.3d 1266, 1268 (2004); Wisconsin: *Hicks v. Nunnery*, 253 Wis.2d 721, 754, 643 N.W.2d 809, 823 (Wis.App. 2002).

v. McCurry, 449 U.S. 90, 94 (1980)).

The rule adopted by the Seventh Circuit, if allowed to stand, will result in the needless filing of innumerable false arrest claims, filings necessary to preserve the claims in the event that a conviction is eventually overturned. As Judge Guy noted in his dissenting opinion in *McCune v. City of Grand Rapids*, 842 F.2d 903, 909 (6th Cir. 1988), if these claims are stayed pending the outcome of criminal proceedings, they will clutter the district court's docket with inactive cases. If these claims are allowed to proceed before the criminal case has reached a final adjudication, there is the potential for inconsistent civil and criminal results, the very evil that the Court identified and attempted to avoid in *Heck*. 512 U.S. at 486.

CONCLUSION

"[T]hose who have been damaged by official action infringing on rights guaranteed them by the Constitution should have an avenue for redress of that damage." *California v. Minjares*, 443 U.S. 916, 927 (1979) (Rehnquist, J, dissenting from denial of stay). The rule of accrual adopted by the Seventh Circuit denies a remedy for an unconstitutional conviction and imprisonment to a person who, like petitioner, was incarcerated for eight years because police officers exploited an unlawful arrest to secure a false confession.

The Court should reverse the Seventh Circuit and hold that when a plaintiff in a §1983 action claims that police officers exploited an unlawful arrest to obtain evidence which is the basis for a criminal prosecution, the cause of action arising from the unlawful arrest

does not accrue until the criminal charges have been resolved in favor of the arrestee.

Respectfully submitted.

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ANDRE WALLACE,
Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO and EUGENE ROY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?

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STATEMENT

On January 17, 1994, John Herbert Handy ("Handy") was murdered in the City of Chicago. R. 31 ¶ 7. On January 19, 1994, respondents, Chicago Police Detectives Kristen Kato and Eugene Roy, were assigned to investigate the murder. *Id.* ¶ 5. As part of their investigation, on the evening of January 19, 1994, Detectives Kato and Roy approached petitioner, Andre Wallace, and brought him to the police station for questioning, where he informed the detectives that he was seventeen years old. *Id.* ¶¶ 18-20, 23-24, and attached Exh. 1 ¶¶ 3, 5. After questioning petitioner over the course of the evening, and after following up on leads stemming from the interview of petitioner and others, Detectives Kato and Roy confronted petitioner with the statements of other interviewees. *Id.* ¶¶ 24, 26-31, 33, and attached Exh. 1 ¶ 5. Petitioner then informed the detectives that he was fifteen years old, after which they called in a youth officer and an assistant state's attorney. *Id.* ¶¶ 34-35. The assistant state's attorney prepared a handwritten statement, which petitioner signed, admitting to Handy's murder. *Id.* ¶¶ 35-36.

As part of the pretrial proceedings in petitioner's prosecution for murder, he filed two motions to suppress—a motion to quash arrest and suppress evidence, and a motion to suppress statements. R. 33 ¶ 45; R. 37, attached Exhs. D1 & D2. The motion to quash arrest and suppress evidence contended that his inculpatory statements were inadmissible as the fruit of an unlawful arrest. R. 37, attached Exh. D2. The motion to suppress statements contended that Detective Kato had employed physical and psychological coercion to obtain petitioner's confession. *Id.*, attached Exh. D1. The Circuit Court of Cook County conducted several days of hearings on the motions and then heard argument. R. 33 ¶¶ 46-54. The court denied both motions, as well as petitioner's request for reconsideration. *Id.* ¶¶ 55-56.

Petitioner was then tried to the bench. During his trial, he did not argue that he was innocent. R. 33 ¶ 57. Rather, in argument through counsel, petitioner admitted shooting Handy, claiming that he did so in self-defense or, alternatively, in mutual combat, and therefore should be found guilty of only second-degree murder. *Ibid.* Petitioner was convicted of first-degree murder. *Ibid.*

On appeal, the Illinois Appellate Court held that at some point after arriving at the police station and before giving his confession, petitioner was illegally seized. R. 33 ¶ 58. The court remanded for a hearing on whether petitioner's confession was sufficiently attenuated from the unlawful arrest to be admissible. *Ibid.* Petitioner had not argued on appeal that his confession was the product of police coercion, and the appellate court did not review the circuit court's finding that it was not. *Ibid.* After an attenuation hearing, the circuit court held that petitioner's confession was admissible, but the appellate court again reversed. R. 31 ¶¶ 41-42. The court held that the confession was insufficiently attenuated from the unlawful arrest, and remanded for a new trial without the confession. J.A. 34-35. The prosecution then moved to *nolle prosequi* the case against petitioner on April 10, 2002. R. 31 ¶ 43. The prosecutor later explained that she had made this motion because petitioner's confession had been deemed inadmissible, and that the prosecution intends to reinstate the murder charges against petitioner if additional evidence against him is obtained. R. 11, attached Exh. C ¶¶ 6-8.

On April 2, 2003, petitioner filed suit against Detectives Kato and Roy and the City of Chicago, alleging a deprivation of his rights under the Fourth and Fourteenth Amendments to the Constitution and seeking redress under 42 U.S.C. § 1983. R. 1-1. The complaint also alleged that the detectives had committed the state-law torts of false imprisonment and malicious prosecution. *Ibid.* The district court granted summary judgment in favor of the defendants on all claims except for what petitioner called a "federal denial of a fair

trial claim." Pet. App. 33-35.[1] Because the contours of the fair trial claim were "not readily apparent from the complaint" (*id.* at 35), the court denied the summary judgment motion with respect to that claim without prejudice (*id.* at 36). About petitioner's other claims, the district court determined that his state-law false imprisonment claim was barred by the statute of limitations (*id.* at 34-35), while petitioner had conceded both that his remaining section 1983 claims were time barred and that his malicious prosecution claim was flawed and should be dismissed with prejudice (*id.* at 33-34). In particular, petitioner had acknowledged in his response to the summary judgment motion that the fact that the criminal proceedings were not terminated in a manner indicative of his innocence was "fatal to his state-law malicious prosecution claim." R. 17 at 3.

Petitioner then filed an amended complaint against only Detectives Kato and Roy, alleging that they had violated his Fourth and Fourteenth Amendment rights by unlawfully arresting him and coercing a false confession. R. 25. The district court entered summary judgment in favor of the detectives on all claims. Pet. App. 37-52. The court found that petitioner's Fourth Amendment false arrest claim was waived and time barred, that any claim based on his allegedly coerced confession was barred by collateral estoppel because the state court had found his confession to be voluntary, and that his denial of a fair trial claim was not cognizable. *Id.* at 43-52.

The court of appeals affirmed. Pet. App. 1-18. With respect to petitioner's Fourth Amendment false arrest claim, the court held that the claim accrued at the time of petitioner's arrest and was therefore time barred. *Id.* at 6-16. In so doing,

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[1] Because the district court granted summary judgment against petitioner, we take the facts most favorably to him for present purposes. See, *e.g.*, *Davis v. United States*, 495 U.S. 472, 485-86 (1990); *Scindia Steam Navigation Co. v. Lauro De Los Santos*, 451 U.S. 156, 159 (1981).

the court overruled inconsistent Seventh Circuit precedent and indicated that the panel's opinion had been circulated to the en banc court. *Id.* at 2 & n.*, 13. With respect to petitioner's coerced confession claim, the court rejected the existence of a "stand-alone 'false confession' claim based on the Fourth Amendment, rather than the Fifth Amendment or the due process clauses." *Id.* at 16-17. Finally, the court rejected petitioner's claim asserting that his allegedly false confession violated his Fourteenth Amendment right to a fair trial. *Id.* at 17-18. Judge Posner dissented from the denial of rehearing en banc on the holding that a Fourth Amendment claim accrues at the time of an allegedly false arrest, arguing that such a claim "*usually* accrues then, but not if the Fourth or Fifth Amendment claim, if valid, would upset the [federal plaintiff's] conviction." *Id.* at 19 (emphasis in original).

This Court granted the petition for certiorari limited to the question "[w]hen does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?"

SUMMARY OF ARGUMENT

Petitioner's claim that the detectives violated his Fourth Amendment rights by holding him for questioning without probable cause is time barred. He waited nine years after his allegedly unlawful arrest to bring this lawsuit, while the applicable statute of limitations is two years.

A claim accrues, for limitations purposes, as soon as the plaintiff experiences an injury for which he has a right to seek relief. In this case, as soon as petitioner was held without probable cause, his Fourth Amendment rights were violated, and he had a right to recover damages, regardless of whether he was later prosecuted or convicted as a consequence of his arrest. Although petitioner describes the entire course of

his prosecution in state court as a "continuing" violation of the Fourth Amendment, the Fourth Amendment forbids not unwarranted prosecutions but "unreasonable searches and seizures." U.S. Const. amend. IV. At most, the criminal prosecution that was occasioned by petitioner's arrest was an adverse consequence of that arrest, but it is well settled that even where damages caused by illegal conduct continue to mount for some time after the conduct has ended, that does not delay the running of the statute of limitations.

Heck v. Humphrey, 512 U.S. 477 (1994), on which petitioner so heavily relies, did not change this settled rule. In *Heck*, the Court, seeking to reconcile section 1983 with the law of habeas corpus, explained that a section 1983 claim may go forward notwithstanding an extant conviction so long as the claim, if successful, would not necessarily imply the invalidity of the conviction. A Fourth Amendment claim does not necessarily imply the invalidity of a conviction. It is well established that an unconstitutional arrest is no bar to an ensuing prosecution. And because Fourth Amendment claims are not cognizable in habeas, there is no justification for delaying accrual of section 1983 actions until a claimant has sought habeas relief. Moreover, the rule advocated by petitioner and the dissenting judge below—delaying accrual when a Fourth Amendment claim seeks suppression of evidence critical to the underlying criminal prosecution—would be unworkable. As the court of appeals explained, a potential section 1983 plaintiff cannot know until his case is tried whether evidence derived from an alleged Fourth Amendment violation will be critical to the prosecution's case against him.

As for petitioner's complaint that the court of appeals' holding will provoke parallel state and federal litigation with disruptive results, parallel litigation is common. It is appropriately addressed not by manipulating the law of accrual, but through other doctrines—abstention in cases where federal civil litigation may interfere with an ongoing

state prosecution; preclusion in cases in which a federal plaintiff seeks to relitigate an issue already decided against him in state court; and equitable tolling in cases in which the plaintiff could not reasonably have been expected to bring suit in a timely fashion. Petitioner's proposed rule, in contrast, will promote the litigation of stale claims and contravenes the settled rule that as soon as a plaintiff suffers a legally cognizable injury—such as a false arrest—the applicable limitations period begins to run.

There is an additional flaw in petitioner's position. Both his argument that his Fourth Amendment claim did not accrue upon his arrest because he seeks damages attributable to his state-court prosecution, and his reliance on claims for false imprisonment, malicious prosecution, and attorney malpractice to recover these damages under the Fourth Amendment, are unfounded.

At the outset, as we explain above, the fact that a claimant continues to experience an injury for which damages are recoverable is not relevant to determining when a cause of action accrues. Thus, the damages recoverable on a Fourth Amendment claim do not govern the question when that claim accrues. But even putting that to the side, there is no support for petitioner's view of the damages that are recoverable on a Fourth Amendment claim.

Petitioner relies on the common-law tort of false arrest and imprisonment to support his view that the entirety of the criminal proceedings against him constitutes a legal wrong for which he can recover damages once those proceedings terminate, but this tort does not allow recovery of damages associated with a criminal prosecution, as this Court explained in *Heck*. As for petitioner's reliance on the common-law rules governing actions for malicious prosecution and attorney malpractice, a necessary element of these torts is a favorable outcome of antecedent legal proceedings. Again, the Fourth Amendment regulates search and seizure, not

criminal prosecutions. Fourth Amendment claims do not rest on antecedent legal proceedings; accordingly, neither malicious prosecution nor attorney malpractice is analogous to a section 1983 Fourth Amendment claim.

Even apart from the lack of common-law analogues that support petitioner's theory of accrual for a section 1983 Fourth Amendment claim, that claim is not properly understood to permit recovery of damages caused by a criminal prosecution. The damages recoverable under section 1983 are appropriately determined by reference to the underlying interests protected by the constitutional tort at issue. This approach provides no support for petitioner's theory that the Fourth Amendment permits recovery of damages arising from a criminal prosecution that was allegedly caused by an improper arrest. As we have explained, the Fourth Amendment protects against unreasonable searches and seizures, not unwarranted prosecutions. And because the interest in being free from prosecution is not one the Fourth Amendment protects, damages associated with the prosecution of a criminal case are not recoverable on a Fourth Amendment section 1983 claim.

ARGUMENT

The state statute of limitations governing actions for personal injury applies to actions brought under section 1983. See *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985). In Illinois, the statute of limitations that applies to personal injury claims is two years. See 735 ILCS 5/13-202 (2004). As petitioner concedes, this statute governs his section 1983 claim. See Pet. Br. 12 n.7. Since petitioner did not file suit within two years of his arrest and detention by respondents, his action is timely only if it accrued within two years of the time he did file suit. To that end, petitioner seizes on the date the charges against him were *nolle prossed* as the date of accrual. That date has no significance for purposes of the accrual of petitioner's Fourth Amendment claim.

It has long been settled that a claim accrues for purposes of the applicable statute of limitations when the claimant suffers a legally cognizable injury. On that test, petitioner's Fourth Amendment claim alleging an arrest without probable cause accrued at the time of the arrest—at that time, petitioner had suffered a legal wrong for which damages are available regardless of whether he was subsequently prosecuted as a consequence of that arrest. Under that straightforward rule, petitioner's Fourth Amendment claim is untimely. Petitioner failed to bring suit for more than nine years after his arrest, well beyond the applicable limitations period.[2]

I. FOURTH AMENDMENT FALSE ARREST CLAIMS ACCRUE AT THE TIME OF ARREST BECAUSE A CLAIMANT CAN RECOVER DAMAGES FOR AN ALLEGEDLY UNCONSTITUTIONAL ARREST REGARDLESS OF THE OUTCOME OF AN ENSUING PROSECUTION.

Under the rules governing accrual, petitioner's Fourth Amendment false arrest claim accrued at the time of his arrest. The rule set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994)—that a section 1983 claim does not accrue when that claim, if sustained, "would render a conviction or sentence invalid" (*id.* at 486)—does not apply in this case because an allegation of an unreasonable search or seizure in violation of the Fourth Amendment is not a claim that necessarily implies the invalidity of a conviction on charges stemming from the search or seizure.

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[2] Although petitioner repeatedly makes reference to alleged coercion of his confession, the state court resolved that issue against petitioner after an evidentiary hearing, as we explain above. In any event, even petitioner acknowledges that "[t]he voluntariness of the confession is not before the Court." Pet. Br. 11 n.5. The Court granted certiorari to consider only the timeliness of a claim for false arrest or other allegedly unreasonable search and seizure. Petitioner's similar references to the alleged falsity of his confession are equally irrelevant to the question on w ch certiorari was granted.

A. Petitioner's False Arrest Claim Accrued At The Time Of His Arrest, Regardless Of The Fact That He Was Prosecuted And Convicted Based On The Fruits Of That Arrest.

It has long been settled that a limitations period ordinarily begins to run when "the plaintiff has a 'complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 195 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)). Accord, *e.g.*, *United States v. Lindsay*, 346 U.S. 568, 569 (1954); *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875). Moreover, "[t]he question as to the time when there was a complete and present cause of action . . . is a federal question . . . ." *Rawlings*, 312 U.S. at 98. And it follows that accrual in section 1983 litigation in particular is necessarily governed by federal law because "[s]ection 1983 provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002). Accordingly, in this case involving a section 1983 claim asserting the Fourth Amendment right to be free from "unreasonable searches and seizures" (U.S. Const. amend. IV), it is necessary to look to federal law to determine when, under the Fourth Amendment, petitioner had a complete and present federal right to seek redress for an allegedly unreasonable search and seizure.[3]

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[3] The courts of appeals are in agreement that the question when a section 1983 claim accrues for purposes of computing the limitations period is governed by federal law. See, *e.g.*, *Gibson v. Superintendent of New Jersey Department of Law*, 411 F.3d 427, 435 (3d Cir. 2005), cert. denied, 126 S. Ct. 1571 (2006); *Behavioral Institute of Indiana, LLC v. Hobart City of Common Council*, 406 F.3d 926, 929 (7th Cir. 2005); *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003) (per curiam); *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir.), cert. denied, 540 U.S. 876 (2003); *Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001); *Beck v. City of Muskogee Police Department*, 195 F.3d 553, 557 (10th Cir. 1999);

The Fourth Amendment forbids detention at a police facility in the absence of probable cause. See, *e.g.*, *Hayes v. Florida*, 470 U.S. 811, 815-16 (1985); *Dunaway v. New York*, 442 U.S. 200, 213-16 (1979). And, as this Court has explained, "[t]he wrong condemned by the Fourth Amendment is 'fully accomplished' by the unlawful search or seizure itself." *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)). Accord, *e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Thus, petitioner's allegations that he was arrested and subsequently detained at a police station through the course of an evening without probable cause assert a violation of his right to be free from unreasonable search and seizure protected by the Fourth Amendment; and that violation was complete as soon as the allegedly unreasonable search and seizure occurred. Moreover, while the Fourth Amendment's exclusionary rule sometimes precludes the admission of evidence obtained as a consequence of a Fourth Amendment violation (see, *e.g.*, *Hudson v. Michigan*, 126 S. Ct. 2159, 2163-65 (2006)), the Fourth Amendment also grants the victims of allegedly unreasonable searches or seizures a right to seek damages (see, *e.g.*, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).[4] Thus, section 1983 affords a damages

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Covington v. City of New York, 171 F.3d 117, 121 (2d Cir.), cert. denied, 528 U.S. 946 (1999); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380-81 (9th Cir. 1998) (per curiam); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996); *Moore v. McDonald*, 30 F.3d 616, 620-21 (5th Cir. 1994). Petitioner agrees. See Pet. Br. 12 n.7.

[4] Of course, petitioner remained wrongfully in the detectives' custody for only a short time, but that does not affect whether he had a claim for damages for that constitutionally improper detention. For example, in *Hudson*, the Court observed that victims of a seconds-long violation of the Fourth Amendment's requirement that officers knock and announce their authority when executing a search warrant were entitled to seek damages under section 1983. See 126 S. Ct. at 2167-68. Surely petitioner had no

remedy to all victims of unreasonable search or seizure, even if they are not prosecuted. See, *e.g.*, *Monroe v. Pape*, 365 U.S. 167, 171-87 (1961), overruled in part on other grounds by *Monell v. Department of Social Services*, 436 U.S. 658 (1977). Accordingly, as soon as the allegedly unconstitutional arrest occurred, petitioner had a complete and present right to seek damages under section 1983 for a violation of his Fourth Amendment rights. His Fourth Amendment cause of action therefore accrued at that time.

The fact that petitioner was subsequently prosecuted as a consequence of his arrest did not prevent the accrual of a cognizable Fourth Amendment claim under section 1983. This Court has long made clear that even those who are convicted through the use of evidence obtained during an unconstitutional search or seizure are entitled to sue for the antecedent Fourth Amendment violation. In *Haring v. Prosise*, 462 U.S. 306 (1983), for example, this Court held that a prisoner's section 1983 action to recover for illegal search and seizure was not barred by his plea of guilty to possessing items found in the search, reasoning that the conviction was "simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under § 1983." *Id.* at 316. Similarly, in *Hudson*, the Court observed that victims of a violation of the Fourth Amendment's requirement that officers knock and announce their authority when executing a search warrant may seek damages under section 1983 even when they are convicted as a consequence of evidence obtained during the search. See 126 S. Ct. at 2167-68.

To be sure, as this Court held in *Allen v. McCurry*, 449 U.S. 90 (1980), if a claimant litigates a Fourth Amendment claim in the course of defending a state-court criminal prosecution, the findings of the state court are entitled to the

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lesser right to seek damages for his allegedly unconstitutional detention over the course of an evening.

same preclusive effect in a subsequent federal action under section 1983 as they would receive in the state courts, a result that will ordinarily prevent relitigation of Fourth Amendment claims that have been resolved adversely to the claimant in the state criminal case. See *id.* at 103-05. See also 28 U.S.C. § 1738. But the existence of a potential preclusion defense does not mean that the section 1983 claim fails to accrue until the criminal case terminates in a manner favorable to the accused, as petitioner suggests. See Pet. Br. 29. In *Allen* itself, even as it recognized a preclusion defense for issues previously litigated, the Court added that to the extent the state court had found that the claimant was the victim of an unlawful search and seizure, he could seek "damages for the part of the seizure declared illegal by the state court." 449 U.S. at 93 n.2. This was so even though the prisoner had been convicted based upon lawfully obtained evidence. See *id.* at 92. More important, while preclusion may be a defense on some section 1983 claims that have already been litigated in state court, the existence of a potential preclusion defense has never prevented a claim from accruing for purposes of the applicable statute of limitations. If the rule were otherwise, claims facing preclusion defenses would simply never accrue.

Nor does it matter for accrual that a claimant faces criminal charges accompanied by pretrial detention—and if things go badly at trial, post-conviction incarceration. If the victim of an allegedly unconstitutional arrest is prosecuted as a consequence of that arrest, that may well be a continuing adverse consequence of the antecedent violation, at least until the prosecution is resolved in his favor. But even if the damages caused by a state-court prosecution and conviction are recoverable on a Fourth Amendment claim—a question we address in Part II below—the fact that a claimant continues to experience adverse consequences flowing from an unlawful act does not delay the running of the statute of limitations. To the contrary, "[t]he proper focus is on the time of the [illegal] act, not the point at which the *consequences* of the

act become painful." *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam) (emphasis in original). For just that reason, in *Chardon*, this Court held that a claim under section 1983 seeking damages for an allegedly unconstitutional termination of public employees accrued when the plaintiffs were notified of the impending termination, and not when they subsequently were discharged. See *id.* at 8. See also *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980).

Petitioner asserts that his claim is "for the 'injury' of being convicted and imprisoned" (Pet. Br. 13-14) (quoting *Heck*, 512 U.S. at 487 n.7), and not simply for an allegedly wrongful arrest. The Fourth Amendment, however, does not address wrongful prosecutions or convictions; its concern is with "unreasonable searches and seizures." U.S. Const. amend. IV. Indeed, this Court has "emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 362 (1998). That is because "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Leon*, 468 U.S. at 906. For this reason, the "use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *Ibid.* (quoting *Calandra*, 414 U.S. at 354) (brackets in original). Accord, *e.g.*, *Scott*, 524 U.S. at 362-63; *Arizona v. Evans*, 514 U.S. 1, 11 (1995).

Accordingly, even if petitioner can recover damages stemming from his prosecution and conviction, that would not delay accrual. His prosecution and conviction were, at most, a continuing consequence of the antecedent Fourth Amendment violation. Such continuing consequences do not prevent accrual. The rule could hardly be otherwise, or the claims of those who suffer permanent disability or other types of injuries that continue indefinitely would never accrue. In short, the fact that petitioner's damages stemming from his allegedly unconstitutional arrest may have continued to

mount until the charges against him were dropped and he was released from custody provides no basis to delay accrual of his Fourth Amendment claim.[5]

B. There Was No Continuing Seizure That Delayed The Running Of The Limitations Period.

Petitioner seeks to avoid the settled rules we discuss above with the argument that he was subjected to a "continuing seizure" that lasted until the charges against him were dropped. Pet. Br. 17-23. He relies on Justice Ginsburg's suggestion in *Albright v. Oliver*, 510 U.S. 266 (1994), that a person may be considered "seized" for Fourth Amendment purposes "so long as he is bound to appear in court and answer the state's charges." *Id.* at 279 (concurring opinion).[6]

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[5] In *Heck*, the Court held that the recoverable damages available to a section 1983 plaintiff "do[] *not* encompass the 'injury' of being convicted and imprisoned (until his conviction has been overturned)." 512 U.S. at 487 n.7 (emphasis in original). Assuming—despite our contrary submission in Part II below—that damages associated with an allegedly wrongful prosecution are sometimes recoverable under the Fourth Amendment, this might mean that a section 1983 plaintiff bringing a Fourth Amendment claim while his conviction is outstanding will face a limitation on the recoverable damages, and may later be able to obtain additional damages if his conviction if vacated. Even so, this limitation on damages is no reason to delay accrual. As we explain above, accrual of the cause of action does not wait for all of the plaintiff's damages to accrue. Rather, the cause of action accrues when there has been a violation of the plaintiff's legally cognizable rights, even if all the damages are not known at the time.

[6] As both the plurality (see 510 U.S. at 271) and Justice Ginsburg (see *id.* at 277 & n.1) recognized, in *Albright*, the petitioner pressed no Fourth Amendment claim in support of his claim that he was entitled to seek relief under section 1983 for an allegedly wrongful prosecution. Accordingly, the Court had no occasion to decide whether Albright had a Fourth Amendment claim that was not barred by the applicable statute of limitations, and the Court lacked the benefit of briefing and argument on any Fourth Amendment issue, including the "continuing seizure" theory that Justice Ginsburg discussed. Even so, although Albright had filed suit

The concept of a continuing seizure that tolls the running of the statute of limitations on a Fourth Amendment claim is unavailing here for at least two reasons.[7]

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within two years of the termination of his prosecution, that was more than two years after he had been arrested; and as a result the plurality added that he "may have missed the [applicable two-year] statute of limitations for any claim he had based on an unconstitutional arrest or seizure." *Id.* at 271 n.5. Thus, *Albright* can hardly be regarded as firm support for petitioner, despite his claim to the contrary. See Pet. Br. 18.

[7] Petitioner claims that the Seventh Circuit "stands alone" in rejecting the "continuing seizure" theory. Pet. Br. 21. In fact, at least three other Circuits also have rejected the theory. See, *e.g.*, *Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003) (en banc), cert. denied, 543 U.S. 808 (2004); *Nieves*, 241 F.3d at 55-56; *Riley v. Dorton*, 115 F.3d 1159, 1162-64 (4th Cir.) (en banc), cert. denied, 522 U.S. 1030 (1997). And the Eleventh Circuit has expressed its "doubts about the viability of this theory." *Kingsland v. City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004). Accord *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). Moreover, the cases petitioner cites offer him little support. As we note above, *Riley* rejects the concept of continuing seizure, and *Whiting* calls it into question. *Lambert v. Williams*, 223 F.3d 257 (4th Cir. 2000), does not even discuss the idea and certainly does not overrule the Fourth Circuit's earlier decision in *Riley*. *Fontana v. Haskin*, 262 F.3d 871 (9th Cir. 2001), and *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000), involve challenges to pretrial detention only, and stand for the proposition that an otherwise lawful arrest may give rise to a Fourth Amendment violation if the police improperly exacerbate the seizure prior to the initial court appearance. See *Fontana*, 262 F.3d at 878-81 (claim that arresting officer sexually harassed arrestee while transporting her to the police station falls within Fourth Amendment because "once a seizure has occurred, it continues throughout the time the arrestee is in the custody of the arresting officers") (citation omitted); *Lauro*, 219 F.3d at 209-13 (although arrestee was lawfully arrested, arrestee's Fourth Amendment rights subsequently were violated by staged "perp walk" before media two hours after arrest). Neither *Fontana* nor *Lauro* suggests that the statute of limitations on a claim against arresting officers does not run once the arrestee is no longer in police custody. Finally, although *Gregory v. City of Louisville*, 444 F.3d 725 (6th Cir. 2006), and *Gallo v. City of Philadelphia*, 161 F.3d 217 (3d Cir. 1998), accept the continuing seizure theory, both concern malicious prosecution claims. See *Gregory*, 444 F.3d at 747-51; *Gallo*,

First, it is inaccurate to characterize an illegal arrest as giving rise to a "continuing seizure" on the part of the arresting officer that lasts until the prosecution ends and the arrestee is released from custody. Instead, once the arrestee is no longer in the arresting officer's custody, the officer's seizure of the arrestee is at an end. For example, under Illinois law, once an arrestee is brought to court for arraignment, the judge must then admit the arrestee to bail as provided by applicable state law. See 725 ILCS 5/109-1 (2004). Accordingly, once petitioner had received a bail hearing, he was no longer in the detectives' custody, nor was he in the custody of the City of Chicago. Instead, his custodial status was determined by the court. It makes no sense to say that Detectives Kato and Roy were guilty of any kind of "continuing seizure" that lasted throughout petitioner's prosecution. To the extent that the allegedly false arrest caused petitioner to be incarcerated subsequent to his bail hearing, that fact is relevant, as we explain above, at most to the damages petitioner experienced as a consequence of the arrest, but whether damages continued to mount until the charges against petitioner were dropped does not delay the running of the statute of limitations.

Second, even if the detectives had in fact committed some sort of "continuing seizure" that persisted throughout petitioner's prosecution and post-conviction custody, such a "continuing" seizure would not delay accrual of petitioner's Fourth Amendment claim. A "continuing" violation delays accrual only in cases in which there is continuing misconduct by the defendant or when the plaintiff suffers an injury that is not actionable at the outset of the defendant's wrongful acts. For example, in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Court acknowledged the general rule that a claim accrues on the date of a defendant's

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161 F.3d at 221-22. As we explain below, petitioner has not pressed a malicious prosecution claim.

wrongful act. See *id.* at 112-13. The Court, added, however, that an alleged hostile work environment was a continuing wrong that delayed the running of the limitations period because "[a] hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice." *Id.* at 117 (citation and internal quotations omitted). Accord *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982) (claimed violation of the Fair Housing Act was considered a continuing violation because it was "based not solely on isolated incidents . . . but a continuing violation manifested in a number of incidents"). Here, however, there was no continuing pattern of unreasonable search or seizure; the detectives arrested petitioner only once, and he was never in their custody after the bail hearing. Thus, the detectives' alleged Fourth Amendment violation was complete once petitioner left their custody. To the extent that the detectives were involved in the ensuing prosecution—as witnesses—that worked no independent or continuing Fourth Amendment wrong because, as we explain above, the Fourth Amendment is addressed to unreasonable search and seizure, not unwarranted prosecutions.

The decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), upon which petitioner also relies (see Pet. Br. 29-31), is inapposite for similar reasons. In that case, the Court acknowledged that private antitrust actions are usually subject to the rule that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business" (401 U.S. at 338), but recognized an exception for cases of a "continuing conspiracy" to violate the federal antitrust laws when the damages are so "speculative" or "unprovable" at the time of a defendant's unlawful act that the plaintiff could not have practicably sought relief at that time (*id.* at 339). As the Court later explained, the exception articulated in *Hazeltine* is inapplicable to cases where the injuries suffered by the plaintiff are "specific and calculable" at the time of the defendant's

wrongdoing. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190-91 (1997). And here, as we explain above, there was a specific and calculable injury based on petitioner's allegedly unconstitutional detention at the police station, regardless of whether petitioner was subsequently prosecuted.

C. The Delayed Accrual Rule Of *Heck v. Humphrey* Does Not Apply To This Case.

Petitioner relies heavily on *Heck* to overcome his having filed suit nine years after his arrest. Under his reading of *Heck*, his unlawful arrest claim did not accrue until the charges against him were dismissed. See Pet. Br. 13-17. But as the court of appeals correctly held, the delayed accrual rule set forth in *Heck* is inapplicable to this case.

In *Heck*, a prisoner brought a section 1983 action alleging that prosecutors and an investigator "had engaged in an 'unlawful, unreasonable, and arbitrary investigation' leading to petitioner's arrest; 'knowingly destroyed' evidence 'which was exculpatory in nature and could have proved [petitioner's] innocence'"; and caused "'an illegal and unlawful voice identification procedure' to be used at petitioner's trial." 512 U.S. at 479 (brackets in original). Relying on "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments" (*id.* at 486), the Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated" (*id.* at 487) (emphasis added). Conversely, "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . . ." *Ibid.* (emphasis in original). Applying this rule, the Court concluded that

Heck's section 1983 claim had never accrued because Heck had not denied that his claim challenged the legality of his still-outstanding conviction. See *id.* at 478 n.2, 489-90.[8]

In dicta, the Court in *Heck* addressed the effect of the rule it had crafted on Fourth Amendment claims:

> a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful.

512 U.S. at 487 n.7 (citations omitted and emphasis in original). As the Seventh Circuit has previously explained, this footnote is "a bit unclear." *Copus v. City of Edgerton*, 151 F.3d 646, 648 (7th Cir. 1998). "[I]t could mean that some Fourth Amendment claims brought under § 1983 would not necessarily be barred if the record revealed the tainted evidence used against the plaintiff at the criminal trial would have been admitted anyway." *Ibid.* But "[o]n the other hand, the footnote might mean that Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so in all cases these claims can go forward." *Ibid.*[9] Petitioner advocates the former reading and

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[8] *Edwards v. Balisok*, 520 U.S. 641 (1997), provides another example of the application of *Heck*. There, the Court held that a prisoner's action attacking the procedures used to revoke good-time credits would not accrue until the decision against him in the disciplinary proceeding was invalidated. See *id.* at 647-48. This was because the prisoner had alleged wrongful exclusion of all the evidence he had adduced in his defense and bias on the part of the hearing officer, both of which, if proved, would require setting aside the decision. See *id.* at 647.

[9] This ambiguity presumably explains the conflict in the Circuits on the question presented. See Pet. App. 14-15. Of course, given that conflict,

petitioner is simply wrong in positing that the Seventh Circuit "stands alone" in its adoption of a rule that Fourth Amendment claims accrue at the time of an allegedly unconstitutional search or seizure. Pet. Br. 14. While the Third Circuit has recently changed course and adopted the fact-specific approach petitioner advocates, see *Gibson*, 411 F.3d at 449, the four other Circuits identified by the court of appeals as having taken a position consistent with its own holding have not altered their approach. For example, the Tenth and Eleventh Circuits expressly have held that accrual is delayed only in the small category of cases in which success on a Fourth Amendment claim will negate an element of the offense charged. See *Beck*, 195 F.3d at 558-59; *Hughes v. Lott*, 350 F.3d 1157, 1160-61 & n.2 (11th Cir. 2003). This limited exception was articulated in *Heck*, see 512 U.S. at 486 n.6, and we rely on this exception below to support our reading of that case. As for the cases cited by petitioner in the First, Eighth, Tenth, and Eleventh Circuits, in *Nieves*, the First Circuit merely acknowledged "that there may be rare and exotic circumstances in which a section 1983 claim based on a warrantless arrest will not accrue at the time of arrest" (241 F.3d at 52 n.4), but this no doubt refers to the same limited exception that other courts recognize, based on *Heck*'s footnote six, which we discuss below, and which the Seventh Circuit's holding accommodates. And while petitioner is correct that the Eighth Circuit in *Anderson v. Franklin*, 192 F.3d 1125 (8th Cir. 1999), dismissed a false arrest claim because the plaintiff had "made no showing that his conviction or sentence has been rendered invalid" (*id.* at 1131), the court did not undertake the fact-specific analysis required by petitioner's approach. Further, the court failed to address *Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996), in which that Circuit had previously adopted the same rule embraced by the Seventh Circuit below. See *id.* at 1095. Most tellingly, since *Anderson*, the Eighth Circuit at least twice has reaffirmed this rule. See *Whitmore v. Harrington*, 204 F.3d 784, 784-85 (8th Cir. 2000) (per curiam); *Moore v. Sims*, 200 F.3d 1170, 1171-72 (8th Cir. 2000). *Anderson* thus does not reflect the law of the Eighth Circuit. As for the Tenth Circuit, although that court stated in a footnote in *Laurino v. Tate*, 220 F.3d 1213 (10th Cir. 2000), that the accrual rule established in *Beck* delays accrual in cases where "all the evidence to be presented was obtained as the result of an illegal arrest" (*id.* at 1217 n.3), *Beck* holds no such thing. Rather, *Beck* expressly reserves judgment on that issue. See 195 F.3d at 559 n.4 (noting its disagreement with the holding of *Covington*, 171 F.3d at 123, that accrual is delayed in cases where "the only evidence for conviction was obtained pursuant to an [unlawful] arrest," and recognizing, in any event, that it was not faced

contends that *Heck* delays accrual of his Fourth Amendment claim until the charges against him were dropped because "[a]ll of the evidence available to the prosecution at petitioner's trial was the fruit of his arrest." Pet. Br. 14.[10] The dissenting judge below similarly urged delayed accrual whenever a Fourth Amendment claim, if successful, would require suppression of either all of the evidence, or evidence sufficiently crucial that its admissibility would be required to sustain the criminal case against the claimant. Pet. App. 21-23. This reading of *Heck* is ultimately untenable.

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with such a case). And, as we explain in Part I.C.3 below, an exception for "only evidence" cases is not only contrary to *Heck* but unworkable. Finally, in *Hughes*, the Eleventh Circuit reaffirmed its view, articulated in *Datz v. Kilgore*, 51 F.3d 252 (11th Cir. 1995), that Fourth Amendment claims categorically accrue at the time of the unlawful search or seizure—but for the limited exception, as we explain above, for claims that challenge an element of the offense charged. See *Hughes*, 350 F.3d at 1160-61. *Uboh v. Reno*, 141 F.3d 1000 (11th Cir. 1998), upon which petitioner relies, is not to the contrary, for it concerns a section 1983 action alleging malicious prosecution and not false arrest. See *id.* at 1003-07. As we explain in Part II.A.2, petitioner has not pressed a malicious prosecution claim.

[10] Petitioner's "only evidence" rule hardly describes his own case. Although petitioner claims that his confession was the only evidence implicating him in Handy's murder, at least two witnesses placed petitioner at the crime scene, including one who told the police that he saw petitioner running from the scene after hearing shots. Pet. App. 3, 31, 38; J.A. 9-10, 26. To be sure, at trial, the prosecution relied heavily on petitioner's confession (no doubt largely because at that point he had made no argument that it was false), and, moreover, the prosecution opted not to retry petitioner immediately once the confession was deemed inadmissible. Nevertheless, had it been necessary, this other evidence could have been offered in addition to the confession at the criminal trial.

1. *Heck* does not delay accrual of Fourth Amendment claims because these claims do not require favorable termination of an antecedent criminal action.

As *Heck*'s Fourth Amendment footnote stressed, the Court's holding prevents accrual only of claims that *necessarily* imply the invalidity of a conviction—or, in cases in which the claimant is yet to be tried on a criminal charge, of Fourth Amendment claims that necessarily imply the invalidity of a potential conviction on the pending charge.[11] This phrase—"necessarily imply the invalidity of [the] conviction"—is a strange way of saying that a claim does not accrue when an examination of the record discloses that the evidence derived from an alleged Fourth Amendment violation should have been suppressed and is necessary to secure a judgment of conviction. Yet the requirement that the section 1983 claim be inherently inconsistent with a valid conviction was central to the holding in *Heck*, as the Court subsequently explained in *Nelson v. Campbell*, 541 U.S. 637 (2004). Ruling that a lawsuit challenging the method for administering a lethal injection was not barred by *Heck*'s holding that some section 1983 actions cannot be brought until the underlying judgment against the accused has been vacated, the Court explained:

> we were careful in *Heck* to stress the importance of the term "necessarily." For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a

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[11] Of the Circuits that have considered the issue, most have applied *Heck*'s delayed accrual rule to cases involving pending criminal charges as well as cases involving extant convictions. See *Covington*, 171 F.3d at 124; *Smith v. Holtz*, 87 F.3d 108, 112-13 (3d Cir.), cert. denied, 519 U.S. 1041 (1996); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 397-98 (6th Cir.), cert. denied, 528 U.S. 1021 (1999); *Washington v. Summerville*, 127 F.3d 552, 555-56 (7th Cir. 1997), cert. denied, 523 U.S. 1073 (1998); *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000); *Beck*, 195 F.3d at 557; *Uboh*, 141 F.3d at 1006-07.

> search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not "*necessarily* imply that the plaintiff's conviction was unlawful." . . . To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination—suits that could otherwise have gone forward had the plaintiff not been convicted.

Id. at 647 (emphasis in original). This point was made in *Heck* itself; the Court explained that Heck's lawsuit was barred because it was akin to a common-law action for malicious prosecution, and "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." 512 U.S. at 484.

Thus, *Heck* delays accrual only of claims that require a favorable termination of an antecedent prosecution and does not delay accrual of claims that may be brought even if the claimant is convicted. As we explain in Part I.A above, Fourth Amendment claims do not require favorable termination of an antecedent prosecution and may be brought even when the claimant is convicted on the strength of evidence obtained as a consequence of an alleged Fourth Amendment violation. That is because the Fourth Amendment addresses unreasonable search and seizure, not wrongful prosecutions, and Fourth Amendment claims therefore accrue immediately upon an allegedly unreasonable search or seizure. Indeed, it is quite settled that an allegedly unconstitutional arrest is not necessarily inconsistent with a valid conviction on charges arising from that arrest. As this Court explained in *Gerstein v. Pugh*, 420 U.S. 103 (1975), "the established rule [is] that illegal arrest or detention does not void a subsequent conviction." *Id.* at 119. The Court reiterated in *United States v. Crews*, 445 U.S. 463 (1980), that "[a]n illegal arrest, without more, has never been viewed . . . as a defense to a valid

conviction." *Id.* at 474. The only exception to this rule—identified in *Heck* itself—is in a case in which success on the section 1983 Fourth Amendment action would require the claimant "to negate an element of the offense of which he has been convicted," such as a conviction for "the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest." 512 U.S. at 486 n.6 (emphasis in original). In this case, petitioner does not claim that the validity of his arrest was an element of any crime for which he was charged or convicted.

In contrast to our reading of *Heck*, the position of petitioner and the dissenting judge below turns on the factual incompatibility between the Fourth Amendment claim and the existence of sufficient untainted evidence to support a conviction. This is little more than a reformulation of the rule that the Court rejected in *Heck* that would have barred suit "whenever 'judgment in a § 1983 action would resolve a necessary element to a likely challenge to a conviction . . . .'" 512 U.S. at 488 (quoting Brief for Respondents 26, n. 10). As the Court explained, concerns about factual inconsistency between prior criminal litigation and a current section 1983 claim are appropriately addressed by doctrines of preclusion, not the law of accrual; and concerns about unwarranted parallel state and federal litigation are appropriately addressed by doctrines of abstention, not rules governing accrual. See *id.* at 487-88 & nn. 8-9. We address the doctrines of preclusion and abstention at greater length in Part I.D below, but for present purposes we note only, as *Heck* itself explains, that concerns about potential overlap between state criminal prosecutions and federal section 1983 litigation supply no reason to manipulate the law of accrual.

2. *Heck* does not delay accrual of Fourth Amendment claims because they are not cognizable in habeas corpus.

There is yet another reason why *Heck*'s rule of delayed accrual is inapplicable to Fourth Amendment claims. *Heck*'s

holding applies only to constitutional claims that must be brought through the vehicle of a habeas corpus action; and allegations that the fruits of an unreasonable search or seizure were improperly used in a subsequent criminal prosecution are not cognizable in habeas corpus.

In *Heck*, the Court explained that it needed to fashion a rule to ensure that section 1983 did not improperly intrude upon the domain of the habeas corpus statute, which requires that those in state custody exhaust their state-court remedies before presenting to a federal court a claim that they are being held in custody in violation of the Constitution or laws of the United States. See 512 U.S. at 480-82. See also 28 U.S.C. § 2254. Thus, *Heck*'s delayed accrual rule properly bars claims that are cognizable only in habeas corpus. Indeed, in his separate opinion, Justice Souter made just this point; he read the Court's opinion "as saying nothing more than that now, after enactment of the habeas statute and because of it, prison inmates seeking § 1983 damages in federal court for unconstitutional conviction or confinement must satisfy a requirement analogous to the malicious-prosecution tort's favorable-termination requirement." 512 U.S. at 500 (opinion concurring in the judgment).

Subsequently, in *Spencer v. Kemna*, 523 U.S. 1 (1998), in which the Court held that a prisoner's release from custody upon the expiration of his sentence rendered his habeas corpus action moot (see *id.* at 14-17), five Members of the Court embraced this understanding of *Heck*, explaining that a section 1983 action can be brought whenever the claimant is unable to bring the same claim under the habeas statute. See *id.* at 21 (Souter, J., joined by O'Connor, Ginsburg & Breyer, JJ., concurring) ("[A] former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy."); *id.* at 21 (Ginsburg, J., concurring) ("Individuals without recourse to

the habeas statute because they are not 'in custody' . . . fit within § 1983's 'broad reach.'"); *id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under 42 U.S.C. § 1983."). See also *Muhammad v. Close*, 540 U.S. 749, 755 (2004) (per curiam) (prisoner's section 1983 action "raised no claim on which habeas relief could have been granted on any recognized theory, with the consequence that *Heck*'s favorable termi-nation requirement was inapplicable").[12]

Accordingly, *Heck* did not bar petitioner's section 1983 Fourth Amendment action until the charges against him were dropped because petitioner never had a habeas remedy available on that claim. This Court has held that a prisoner may not seek habeas relief on the ground that he was prosecuted on the basis of evidence obtained in violation of the Fourth Amendment "where the State has provided an opportunity for full and fair litigation" of that claim. *Stone v. Powell*, 428 U.S. 465, 481-82 (1976). Illinois, of course, offered petitioner such an opportunity to present his Fourth Amendment claim; indeed, he prevailed on that argument in the state-court criminal proceedings. *Heck*'s favorable termination requirement therefore has no application here.

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[12] Cf., *e.g.*, *Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002) (*Heck* does not apply to a section 1983 claim challenging revocation of good-time credits—success on which would imply the invalidity of the plaintiff's conviction—where plaintiff had been released from incarceration and habeas was therefore unavailable), cert. denied, 540 U.S. 1218 (2004); *Huang v. Johnson*, 251 F.3d 65, 73-75 (2d Cir. 2001) (a section 1983 action challenging denial of credit for time served in pretrial incarceration was not barred by *Heck* where the incarceration had been fully served and habeas was unavailable); *Shamaeizadeh*, 182 F.3d at 396 n.3 (noting that *Spencer* casts doubt on whether *Heck* applies to prisoners no longer incarcerated for whom habeas relief is not available); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) (same).

3. Petitioner's reading of *Heck* gives rise to anomalous results.

The ground on which the court of appeals rested its holding was that petitioner's reading of *Heck* provides claimants with no practicable way to determine when their Fourth Amendment claims accrue. See Pet. App. 12-13. These concerns are amply warranted.

As this Court has explained, "[f]ew areas of law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Wilson*, 471 U.S. at 266 (citation and internal quotations omitted). This is because uncertainty about rules governing the running of statutes of limitations

> is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.

Id. at 275 n.34. Accord, *e.g.*, *Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities" are "the basic policies of all limitations provisions"). For section 1983 claims in particular, the Court has explained that an approach to the applicable statute of limitations that turns on "the particular facts of each claim . . . inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983." *Wilson*, 471 U.S. at 272.

Under either the rule advocated by petitioner—that accrual is delayed when all the evidence adduced at the criminal trial is the fruit of an alleged Fourth Amendment violation—or the rule advanced by the dissenting judge below—that accrual is delayed when evidence critical to the conviction is the fruit of an alleged violation—a plaintiff will never be able to know

with confidence when his claim has accrued. For one thing, not all plaintiffs are criminally charged at the time of an allegedly unreasonable search or seizure. The victims of an alleged false arrest, for example, may be released without charge, although charges could still be brought at any point within the applicable statute of limitations.[13] Even after charges are brought, the claimant will not know whether evidence obtained as a consequence of an alleged Fourth Amendment violation will be the only evidence offered against him, or, at a minimum, will be critical to the prosecution's case. Until the criminal case goes to trial, the claimant cannot predict with confidence what types of evidence will be adduced by the prosecution at trial. And even after trial, the claimant will frequently be unsure whether his conviction can stand without support from the evidence obtained through an alleged Fourth Amendment violation. It may take years of appellate litigation before this sorts itself out.

These problems are demonstrated by petitioner's own case. As the district court recognized, the Illinois Appellate Court's initial directive to the state trial court to "reinstate [petitioner's] conviction" if his confession was sufficiently attenuated from his unlawful arrest to be admissible (J.A. 22), "acknowledged the possibility that, even if Petitioner was illegally arrested, his conviction could still stand" (Pet. App. 51). As a result, even after the state appellate court's first ruling, petitioner did not know whether success on his Fourth Amendment claim meant that his conviction could not stand.

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[13] In Illinois, for example, for most felony offenses the applicable statute of limitations is three years, although there is no limitations period for first-degree murder. See 720 ILCS 5/3-5 (2004). Accordingly, a potential section 1983 plaintiff not charged immediately after an allegedly unreasonable search or seizure cannot know for quite some time whether charges will eventually be brought—and, as here, in cases involving first-degree murder, the claimant may remain unsure for many years if not decades.

If the state courts had ultimately ruled that petitioner's confession was sufficiently voluntary to dissipate the taint of the antecedent Fourth Amendment violation, petitioner's conviction would have been able to stand. See *Brown v. Illinois*, 422 U.S. 590, 601-04 (1975). See also *Hudson*, 126 S. Ct. at 2164-65. Accordingly, under petitioner's own accrual rule, by waiting for the criminal litigation to conclude, he would have been too late to bring his Fourth Amendment claim if the result of the attenuation hearing in state court had been different. Petitioner's rule is a trap for the unwary.

Accordingly, the court of appeals was quite right to observe that "*ex ante* it is not readily apparent which criminal cases might proceed despite the consequences of the successful Fourth Amendment challenge." Pet. App. 12. This difficulty, the court concluded, "argues against a rule that requires judges several years after the event to decide whether a particular Fourth Amendment challenge would have been the death knell of the prosecution." *Ibid.* Indeed, petitioner's reading of *Heck* places potential section 1983 plaintiffs in a position where they can safely preserve their rights only by assuming that the statute of limitations will begin to run immediately—the very outcome that the court of appeals adopted. Thus, petitioner's proposed rule does not even achieve his stated objective of permitting claimants to wait for a favorable termination of their criminal cases before they need file a civil action under section 1983. Moreover, other than the holding below, the only way to spare potential plaintiffs the uncertainty that inheres in petitioner's rule would be to announce that all Fourth Amendment claims enjoy delayed accrual. Even petitioner has never advocated such a rule—presumably because it was expressly rejected by *Heck* itself. See 512 U.S. at 486-87 & nn. 6-7.[14] Beyond

[14] Of course, a rule of delayed accrual of all Fourth Amendment claims until the antecedent criminal case ends is also inconsistent with the settled

that, such a rule—as well as the slightly more modest proposals embraced by petitioner and the dissenting judge below involving delayed accrual for a goodly share of Fourth Amendment claims—creates equally serious problems.

The elimination of stale claims is primary among the interests that underlie statutes of limitations. See, *e.g.*, *Rotella*, 528 U.S. at 555; *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980); *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). As this Court has explained, "[l]imitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983). In particular, "'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" *Ricks*, 449 U.S. at 259-60 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). Indeed,

> [a] federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.

Wilson, 471 U.S. at 271 (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805)). Allowing a section 1983 plaintiff to wait until the state courts vacate a conviction resting on

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rule that a Fourth Amendment claim does not turn on what happens in a related criminal case, as we explain in Part I.A, above. This rule presumably underlies *Heck*'s admonition that Fourth Amendment claims can accrue immediately. See 512 U.S. at 487 n.7. A rule of accrual delaying all Fourth Amendment claims would therefore require disavowing the approach taken in *Heck*.

evidence obtained in violation of the Fourth Amendment is wholly at odds with these critical objectives.

As petitioner's own case demonstrates, his proposed rule will postpone section 1983 Fourth Amendment litigation until long after an alleged unreasonable search or seizure has occurred. The delay is nine years here, perhaps more in other cases. Such delay cannot be justified. A person who claims he was arrested without probable cause has all the evidence necessary to litigate the constitutionality of the police conduct as soon as that conduct occurs. Moreover, unless the defendant is given prompt notice of potential liability, he will lack fair notice of the need to preserve records or take other steps to ensure that material evidence remains available for litigation. In short, petitioner's approach to accrual creates the potential for lengthy delays that could be enormously prejudicial. Even more important, petitioner's rule compromises the integrity of the administration of justice; the truth-seeking process itself is prejudiced when cases must be tried on the basis of stale evidence.[15] That is reason enough to reject petitioner's reading of *Heck*.

D. The Clarity Of The Holding Below Is Not Undermined By The Doctrine Of Tolling.

As the court of appeals explained, the rule that Fourth Amendment claims accrue immediately upon an allegedly unreasonable search or seizure is clear and easy to administer. Pet. App. 11-14. The dissenting judge below, however, claimed that the doctrine of tolling would undermine the clarity of the rule and result in delayed accrual in a wide

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[15] On petitioner's view, the defense of laches will be unavailable as well. That doctrine offers a defense only when a plaintiff has unreasonably delayed bringing suit and the delay has prejudiced the defense. See, *e.g.*, *Morgan*, 536 U.S. at 102-04. Because on petitioner's view, a claimant cannot bring suit until the criminal case has reached a termination favorable to him, even lengthy delays that result in material prejudice to the defense cannot be the subject of a laches defense.

variety of cases, citing the decision in *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir.), cert. denied, 528 U.S. 1021 (1999). Pet. App. 23-24.[16] Petitioner does not endorse the concern that the battle over accrual will simply become a battle over tolling, nor does he claim any basis for tolling in this case. In fact, the dissenting opinion's concern is unwarranted.

Just as federal courts apply state statutes of limitations to section 1983 actions, they borrow state tolling rules when determining the timeliness of such actions. See, *e.g.*, *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989); *Tomanio*, 466 U.S. at 485. Petitioner agrees with this (see Pet. Br. 12 n.7), but has never identified any basis under Illinois law to delay the running of the limitations period until the charges against him were dropped, thereby waiving such an argument. His reluctance to invoke tolling is understandable; Illinois simply has no tolling doctrine that would excuse his filing the complaint in this case nearly nine years after his arrest. For example, Illinois law does not toll the limitations period while a claimant is in custody. See, *e.g.*, *Schweihs v. Burdick*, 96 F.3d 917, 919 (7th Cir. 1996) (applying Illinois law). Nor is there reason to require tolling on that basis; as this Court has recognized, "many prisoners are willing and able to file § 1983 suits while in custody." *Hardin*, 490 U.S. at 544.[17] Moreover, a section 1983 claim based on an alleged violation of Fourth Amendment rights in the course of an arrest is a

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[16] In *Shamaeizadeh*, the Sixth Circuit actually did not invoke the doctrine of tolling, but instead adopted the accrual rule favored by the dissenting judge below on the ground that to require a criminal defendant to file a section 1983 action at the time of an allegedly unlawful search or seizure would "misdirect the criminal defendant," who should be allowed to "focus on his primary mode of relief—mounting a viable defense to the charges against him—before turning to a civil claim under § 1983." 182 F.3d at 399.

[17] Some States nevertheless allow tolling when the claimant is in custody. See, *e.g.*, *Hardin*, 490 U.S. at 540 n.8.

particularly easy one for those facing criminal charges to assert, since they will presumably be attuned to Fourth Amendment issues as a consequence of the defense of the pending criminal action. Illinois law also rejects tolling on a false arrest claim while criminal charges remain pending, even though the claimant still facing charges has not yet experienced the bulk of the potential damages stemming from the arrest. See, *e.g.*, *Gonzalez v. Entress*, 133 F.3d 551, 554 (7th Cir. 1998) (applying Illinois law). See also *Golla v. General Motors Corp.*, 657 N.E.2d 894 (Ill. 1995).[18] Thus, nothing in Illinois law suggests that tolling is so widespread that it will undermine the benefits of the categorical rule adopted by the court of appeals. And in these respects, Illinois tolling law is hardly atypical. The "virtue" of tolling, as this Court has explained, is precisely that it is "the exception, not the rule." *Rotella*, 528 U.S. at 561.

That is not to say that tolling will never be appropriate in these cases. Tolling is designed for cases in which the claimant, although "pursuing his rights diligently," is unable to sue in time because "some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). In *Heck*, the Court recognized the possibility that the doctrine of

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[18] Moreover, under Illinois law, even in cases where tolling is otherwise available, "tolling doctrines require that the plaintiff get the litigation under way promptly after the circumstance justifying delay is no longer present." *Gonzalez*, 133 F.3d at 554. Accord, *e.g.*, *Shropshear v. Corporation Counsel*, 275 F.3d 593, 595 (7th Cir. 2001); *Ashafa v. City of Chicago*, 146 F.3d 459, 464 (7th Cir. 1998). This alone should disqualify petitioner, who did not file suit until nearly one year after the criminal charges were dismissed and he was released from custody. Cf., *e.g.*, *Gonzalez*, 133 F.3d at 554 (nine-month delay in filing suit after release from custody is too long). That delay is simply not explained by petitioner's observation that, under Illinois law, the running of the limitations period was tolled until he turned 18 in 1997 (Pet. Br. 12-13 n.7) because he did not file this suit for more than five years after that.

tolling would apply to section 1983 claims not subject to delayed accrual. See 512 U.S. at 489. See also Pet. App. 13 (noting that this issue had been "reserved" in *Heck*). If there is a case in which some exceptional circumstance justifiably prevented a claimant from bringing suit under section 1983 until the antecedent criminal case had ended, the doctrine of tolling will provide the appropriate vehicle for weighing that justification. And, because tolling will fully serve the interests of those who truly could not file timely, without undermining the clarity and certainty of a categorical rule of accrual, there is no reason to manipulate the rules for accrual as petitioner urges, nor any basis to fear that the cases presenting a genuine basis for tolling will swallow the general rule.

Equally important, considering the justification for delay under the rubric of tolling leaves state courts and legislatures free to weigh the costs and benefits of delaying the initiation of section 1983 litigation. This approach is consistent with Congress's decision not to enact a nationwide statute of limitations for section 1983, but instead "to defer to 'the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action.'" *Hardin*, 490 U.S. at 538 (quoting *Wilson*, 471 U.S. at 271). Thus, tolling doctrines offer aid to the plaintiff who can demonstrate compelling justifications for delay without distorting the law of accrual or undermining the role of state statutes of limitations in giving defendants prompt notice and opportunity to investigate potential liabilities.

E. The Court Of Appeals' Holding Does Not Create Unnecessary Litigation Or Unwarranted Friction Between The Federal And State Courts.

Petitioner criticizes the holding of the court of appeals that Fourth Amendment claims accrue immediately as "result[ing] in the needless filing of innumerable false arrest claims" that

will "clutter the district court's docket . . . ." Pet. Br. 33. This criticism is unjustified. As we explain above, Fourth Amendment rights ordinarily do not turn on the outcome in a related criminal case, so the filing of a section 1983 action prior to the termination of a related criminal proceeding is not "needless" or "clutter." Equally important, petitioner's own rule will create precisely the same result. As we explain above, the risks to plaintiffs of the fact-specific approach advocated by petitioner and the dissenting judge below will necessitate the filing of prophylactic claims, since potential section 1983 Fourth Amendment plaintiffs cannot know in advance of trial—and sometimes not even after trial—whether a conviction necessarily rests on evidence that cannot be used under the Fourth Amendment's exclusionary rule. Thus, under petitioner's rule, prophylactic section 1983 actions will be filed while related state criminal proceedings are underway, and the federal courts will encounter the same difficulties that the parties themselves will face in figuring out whether these claims cannot proceed because they would, if sustained, require suppression of all or the most important evidence to be used against the plaintiff in the underlying criminal action—which itself may not yet have gone to trial.

In any event, there are far better ways to avoid overlapping or duplicative litigation between the state and federal courts than by manipulating accrual rules. As *Heck* anticipated, its holding will sometimes require a claimant to file a section 1983 action while a related criminal case is pending, and noted, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), that "abstention may be an appropriate response to the parallel state-court proceedings." 512 U.S. at 488 n.8. In turn, *Colorado River* recognized that parallel state and federal litigation is not uncommon, and held that a federal court may appropriately abstain from exercising its jurisdiction under circumstances in which an exercise of federal jurisdiction may interfere with ongoing state proceedings. See 424 U.S. at 813-20. Ac-

cordingly, when there is a real and substantial risk that a section 1983 case will interfere with a state prosecution, either by enabling the state defendant to circumvent limitations on discovery under state law or to move critical fact-finding to federal court, the case for abstention will be powerful. Cf. *Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts must abstain in section 1983 actions seeking to enjoin an ongoing prosecution). Indeed, the courts of appeals have almost universally concluded that abstention is appropriate in section 1983 damages actions where adjudication of those claims would interfere with pending state proceedings by resolving identical issues and thereby undermining the state courts' consideration of the issues. See, *e.g.*, *Gilbertson v. Albright*, 381 F.3d 965, 978-79 n.13 (9th Cir. 2004) (collecting cases).[19]

Under abstention principles, a court may not dismiss a section 1983 damages action, but instead should stay it pending the outcome of related state-court proceedings. See *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 719-31 (1996). Upon the conclusion of the state proceedings, the federal court hearing the section 1983 case will then be obligated to afford the same preclusive effect to the findings of the state court as those findings would receive in the courts of that state, as we explain in Part I.A above. Thus, although petitioner claims that the accrual rule adopted by the court of appeals will create opportunities for collateral attacks on criminal convictions and may lead to overlapping state and federal litigation that could produce inconsistent results (see Pet. Br. 32-33), these concerns are vastly overstated, given

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[19] This Court has not determined whether *Younger* abstention applies to section 1983 damages claims. See, *e.g.*, *Deakins v. Monaghan*, 484 U.S. 193, 202 & n.6 (1988). In that case, however, two Members of the Court would have held that *Younger* does apply because the practical effect of damages relief and injunctive relief is virtually identical, and the federal policy of not interfering with a state proceeding is just as strong. See *id.* at 209-10 (White, J., joined by O'Connor, J., concurring).

the doctrines of abstention and preclusion. And as we note above, in *Heck* itself, the Court explained that concerns about potential inconsistencies between the judgments of state and federal courts are properly addressed not by rules of accrual but instead by a variety of other doctrines that reflect principles of comity between the federal and state courts. See 512 U.S. at 488-90 & nn. 8-9. The Court added that these "judge-made" rules may be applied flexibly to "take account of the policy . . . that state courts be given the first opportunity to review constitutional claims bearing upon state prisoners' release from custody." *Id.* at 488-89 n.9 (citation and internal quotations omitted). Accordingly, the doctrines of abstention and preclusion provide the appropriate vehicles for ensuring that section 1983 does not create duplicative litigation or intrude upon the States' administration of their systems of criminal justice, rather than, as petitioner urges, shoehorning these objectives into the law of accrual.

II. PETITIONER'S REQUEST FOR DAMAGES ASSOCIATED WITH HIS PROSECUTION DOES NOT DELAY ACCRUAL OF HIS FALSE ARREST CLAIM BECAUSE SUCH DAMAGES ARE UNAVAILABLE ON A FOURTH AMENDMENT CLAIM.

In addition to his strained reading of *Heck* and his belief in the concept of a "continuing seizure" that delays accrual, petitioner also relies on a variety of common-law rules to support his view of accrual. See Pet. Br. 23. But petitioner's analogies to various common-law rules governing accrual or recoverable damages should be rejected. Moreover, his attempt to delay accrual based on his argument that he is permitted to recover damages associated with a criminal prosecution fails because these damages are not recoverable in a section 1983 Fourth Amendment action.

A. The Common Law Provides No Support For Petitioner's Accrual Rule.

In *Heck*, the Court wrote:

> The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process. If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more. But a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society.

512 U.S. at 484 (internal quotations and citations omitted). The Court then noted that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Ibid.* On this basis, the Court held that because Heck sought to recover damages for an allegedly wrongful prosecution, his claim could not accrue until the underlying criminal proceeding had terminated in his favor. See *id.* at 489-90. Petitioner attempts to fit within this rule by arguing that his Fourth Amendment claim is akin to various common-law claims—false imprisonment, malicious prosecution, or attorney malpractice. His reliance on these common-law doctrines is unavailing.

1. The common-law claim of false arrest and imprisonment provides no support for petitioner's accrual rule.

Petitioner characterizes his claim for damages associated with his criminal prosecution as a claim for false arrest and imprisonment, which, he further asserts, permits recovery of damages associated with confinement pursuant to legal

process, akin to the tort of malicious prosecution considered in *Heck*. See Pet. Br. 23-27. But this view was rejected by *Heck* itself. As petitioner concedes, false arrest and false imprisonment are essentially complementary descriptions of a single tort. See *id.* at 23 ("[A] person who is falsely arrested is at the same time falsely imprisoned.") (quoting *Whirl v. Kern*, 407 F.2d 781, 790 (5th Cir. 1968), cert. denied, 396 U.S. 901 (1969)). In *Heck*, however, the Court rejected petitioner's view of the damages recoverable for this tort: "'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more.'" 512 U.S. at 484 (quoting W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, Prosser and Keeton on the Law of Torts 888 (5th ed. 1984)).

Accordingly, petitioner is forced to attack *Heck*—the very decision on which he otherwise heavily relies—by questioning the reliability of the treatise that the Court cited on this point (see Pet. Br. 26), but the view stated therein is hardly idiosyncratic. See, *e.g.*, 35 C.J.S., *False Imprisonment* §§ 3, 64 (1960) (after noting that "[t]he terms 'false arrest' and 'false imprisonment' are virtually synonymous," explaining that "damages may be awarded for false arrest only for the period from initial custody until arraignment; subsequent damages resulting from continued incarceration are attributable only to the tort of malicious prosecution"); 1 Dan B. Dobbs, The Law of Torts § 39 n.2 (2001) ("Once a formal charge has been made and the plaintiff is confined by judicial order after arraignment, the false imprisonment is terminated and the claim for any remaining damages must ordinarily be one for malicious prosecution."). Indeed, there are good reasons to view the tort of false arrest and imprisonment as it was characterized by this Court in *Heck*. After all, "an action for false imprisonment redresses the violation of plaintiff's freedom of movement and not freedom from unjustifiable litigation." *Broughton v. State*, 335 N.E.2d 310, 316 (N.Y.), cert. denied, 423 U.S. 929 (1975). Accordingly, the pre-

vailing common-law rule is that "[w]here a plaintiff successfully establishes liability for false imprisonment his damages will be measured only to the time of arraignment or indictment whichever occurs first." *Ibid.* Accord, *e.g.*, *Asgari v. City of Los Angeles*, 937 P.2d 273, 281 (Cal. 1997).

Petitioner can identify only one case that provides any support whatever for his position on damages, and even that is a slender reed. *Simanton v. Caldbeck*, 121 A. 411 (Vt. 1923), holds that a plaintiff who is successful on a false imprisonment claim may recover as damages the attorney's fees and costs he incurred in defending himself during an ensuing criminal prosecution. See *id.* at 412.[20] At the outset, of course, this is not petitioner's rule at all. Petitioner seeks a far greater measure of damages than was approved in *Simanton*. In any event, the weight of authority is that expenses incurred in the defense of a criminal prosecution are not recoverable in a false imprisonment action. See, *e.g.*, *Fidelity & Deposit Co. v. Adkins*, 130 So. 552, 553 (Ala. 1930); *Barnes v. District of Columbia*, 452 A.2d 1198, 1200 (D.C. 1982); *City of Miami Beach v. Bretagna*, 190 So. 2d 364, 365-66 (Fla. Dist. Ct. App. 1966); *Broughton*, 335 N.E.2d at 316.

Aside from *Simanton*, petitioner relies on what he describes as "[t]he 'almost universal rule' . . . that a claim for false imprisonment accrues on the termination of the imprisonment." Pet. Br. 24. But, as the case on which he primarily relies, *Collins v. Los Angeles County*, 50 Cal. Rptr. 586 (Cal. Dist. Ct. 1966), explains, the "termination of the imprisonment" that triggers accrual is "not at the time the

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[20] Although petitioner also cites *Bonesteel v. Bonesteel*, 30 Wis. 511, 1872 WL 3125 (1872), it holds only that a plaintiff bringing a false imprisonment claim may recover "counsel fee and expenses in procuring his discharge from arrest." 1872 WL 3125, at *3. It does not indicate that these damages would include attorney's fees incurred in the defense of a subsequent prosecution.

proceedings under which plaintiff's arrest occurred ended." *Id.* at 588. Indeed, *Collins* describes *Belflower v. Blackshere*, 281 P.2d 423 (Okla. 1955), as "[a] leading case" on this point, 50 Cal. Rptr. at 588, and in *Belflower* the court held that the statute of limitations begins to run on a false arrest and imprisonment claim "at the time the plaintiff was released from his alleged illegal restraint and not when the proceedings by which his arrest occurred terminated." 281 P.2d at 425. Similarly, another case *Collins* cites is *Knickerbocker Steamboat Co. v. Cusak*, 172 F. 358 (2d Cir. 1905), and in that case the court explained that the "practically unanimous" view is that "in an action solely for false imprisonment, the termination of the criminal proceedings is immaterial." *Id.* at 359. Most of the cases petitioner cites, like *Collins*, hold only that a claim for false imprisonment accrues when the plaintiff is released from custody upon charging, either on bail or otherwise.[21] And not a single one holds that accrual should be delayed until the termination of the underlying criminal prosecution.

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[21] See *Collins*, 50 Cal. Rptr. at 589; *Stanford v. City of Manchester*, 539 S.E.2d 845, 847 (Ga. Ct. App. 2000); *Matovina v. Hult*, 123 N.E.2d 893, 896-98 (Ind. App. 1955); *Jedzierowski v. Jordan*, 172 A.2d 636, 637 (Me. 1961); *Heron v. Strader*, 761 A.2d 56, 59-60 (Md. 2000); *Nawrocki v. Eberhard Foods, Inc.*, 180 N.W.2d 849, 851 (Mich. Ct. App. 1970); *Stafford v. Muster*, 582 S.W.2d 670, 674, 680 (Mo. 1979); *Jackson v. New York City Police Department*, 500 N.Y.S.2d 553, 554 (App. Div. 1986); *Mobley v. Broome*, 102 S.E.2d 407, 409 (N.C. 1958), overruled on other grounds by *Fowler v. Valencourt*, 435 S.E.2d 530 (N.C. 1993); *O'Fallon v. Pollard*, 427 N.W.2d 809, 811-12 (N.D. 1988); *Belflower*, 281 P.2d at 425-26; *Nave v. City of Seattle*, 415 P.2d 93, 94-95 (Wash. 1966); *Oosterwyk v. Bucholtz*, 27 N.W.2d 361, 362 (Wis. 1947). Petitioner's other cases are even further afield. Two involve claims that the plaintiff was falsely imprisoned in a mental hospital, which are far from analogous to pretrial or post-conviction incarceration. See *Kirwan v. State*, 320 A.2d 837 (Conn. Super. Ct. 1974); *Adler v. Beverly Hills Hospital*, 594 S.W.2d 153 (Tex. Civ. App. 1980). In another, the plaintiff was held, apparently without process, in various jails and military prisons during the Civil War. See *Huggins v. Toler*, 64 Ky. (1 Bush) 192 (1866).

Beyond that obvious problem with petitioner's reliance on the tort of false arrest and imprisonment, he also fails to take account of this Court's explanation in *Heck* that the reason accrual should be delayed on constitutional torts akin to the common-law tort of malicious prosecution is because "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." 512 U.S. at 484. Petitioner does not even claim that the tort of false arrest and imprisonment ever had a similar requirement of termination of the antecedent criminal prosecution in a manner favorable to the accused. Indeed, not a single case petitioner cites holds that an action for false arrest and imprisonment accrues only when a criminal prosecution terminates in a manner favorable to the accused.

2. A Fourth Amendment claim is not akin to a common-law claim for malicious prosecution.

Petitioner also argues that his Fourth Amendment claim can be analogized to a malicious prosecution claim on which the common law delayed accrual until the accused received a favorable termination. See Pet. Br. 27-29. Petitioner, however, presses no malicious prosecution theory of liability; to the contrary, although he included a state-law malicious prosecution claim in his original complaint, he later agreed to the dismissal of that claim with prejudice. R. 17 at 3. Petitioner rightly abandoned his malicious prosecution theory; the record did not indicate that the charges against him were dropped because the prosecutor had concluded that he was innocent, but only because the confession had been suppressed as a fruit of an illegal detention. This was insufficient to satisfy the common-law favorable termination requirement, which requires a final disposition "to indicate the innocence of the accused." Restatement (Second) of Torts § 660 cmt. a (1965). See also *Swick v. Liautaud*, 662 N.E.2d 1238, 1243 (Ill. 1996) (a malicious prosecution claim may be predicated

on a prosecutor's decision to *nolle prosequi* only where the "plaintiff establishes that the *nolle prosequi* was entered for reasons consistent with his innocence").

More important, petitioner's effort to analogize a Fourth Amendment action to a common-law suit for malicious prosecution is deeply unpersuasive. As we explain in Part I.A above, Fourth Amendment claims do not turn on the outcome of an antecedent prosecution, and for that reason they are fundamentally different from the claim forwarded in *Heck*. Because Heck agreed that proof that he was wrongfully convicted was essential to his claim, the Court held that the claim could not accrue as long as his conviction was outstanding. See 512 U.S. at 479 & n.2, 490.[22] Heck asserted no Fourth Amendment claim, and with good reason. As we explain in Part I.A, the Fourth Amendment regulates unreasonable search and seizure, not unwarranted prosecutions; and it protects the innocent and guilty alike. But while Heck wished to attack his prosecution and therefore disclaimed reliance on the Fourth Amendment, petitioner presses only a Fourth Amendment claim in this Court, and therefore necessarily seeks liability not for his prosecution—which was, after all, undertaken by a prosecutor and not the detectives—but instead for an allegedly unreasonable seizure. Such an action bears no relation to the tort of malicious prosecution. Cf. *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring) (noting that a "'malicious prosecution' theory" against police officers "is anomalous" because "[t]he principal player in carrying out a prosecution . . . is not police

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[22] Heck's concession was warranted. For example, Heck's claim that exculpatory evidence was suppressed necessarily required proof of wrongful conviction. Under *Brady v. Maryland*, 373 U.S. 83 (1963), the suppression of exculpatory evidence violates the Due Process Clause only when there is a reasonable probability that the suppressed evidence would have affected the outcome of the trial. See, *e.g.*, *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Kyles v. Whitely*, 514 U.S. 419, 434-35 (1995).

officer but prosecutor").[23] Accordingly, there simply is no persuasive analogy between Fourth Amendment and malicious prosecution claims.[24]

3. A Fourth Amendment claim is not analogous to an attorney malpractice claim.

Petitioner's reliance on attorney malpractice cases (see Pet. Br. 31-32), is even more misplaced. Petitioner makes two points in this regard, both of which are readily dismissed.

First, petitioner notes that a majority of States considering the issue have held that a plaintiff must show exoneration by post-conviction relief before he may sue his defense lawyers. See Pet. Br. 31. Tellingly, petitioner neglects to mention that

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[23] Under Illinois law, prosecutions for violations of state law are undertaken not by police officers or even their municipal employers, but by an independent official, the State's Attorney for the relevant county. See 55 ILCS 5/3-9005(a)(1) (2004).

[24] The cases that petitioner cites on this point (see Pet. Br. 27 n.16) offer him little aid. Several were brought by plaintiffs not charged with a crime, and they therefore shed no light on the question whether the Fourth Amendment addresses an allegedly unwarranted prosecution. See *Washington v. County of Rockland*, 373 F.3d 310, 315-17 (2d Cir. 2004); *Estate of Smith v. Marasco*, 318 F.3d 497, 521-22 (3d Cir. 2003), opinion following remand, 430 F.3d 140 (3d Cir. 2005); *Lambert*, 223 F.3d at 259. Others involved plaintiffs who were released shortly after arrest and had the charges against them dismissed before trial. See *Grubbs v. Bailes*, 445 F.3d 1275, 1278 (10th Cir. 2006); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004); *Thacker v. City of Columbus*, 328 F.3d 244, 251, 258-59 (6th Cir. 2003). And two of the three plaintiffs who actually went to trial were acquitted, so there was no question that they—unlike petitioner—were able to show favorable termination. See *Wood v. Kesler*, 323 F.3d 872, 876 (11th Cir.), cert. denied, 540 U.S. 879 (2003); *Moran v. Clarke*, 296 F.3d 638, 642 (8th Cir. 2002). Finally, *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004), was brought by a former prisoner after DNA evidence demonstrated that he was "factually innocent" and his conviction was vacated. *Id.* at 1294. Thus there was no question that he, too, could show favorable termination.

these States have also held that such a plaintiff must further prove actual innocence. See *Canaan v. Bartee*, 72 P.3d 911, 915-16 (Kan.) (collecting cases from other states), cert. denied, 540 U.S. 1090 (2003); *Levine v. Kling*, 123 F.3d 580, 582 (7th Cir. 1997); *Trobaugh v. Sondag*, 668 N.W.2d 577, 582 (Iowa 2003); *Robinson v. Southerland*, 123 P.3d 35, 43 (Okla. Civ. App. 2005). Moreover, as with all negligence claims, a plaintiff asserting legal malpractice must establish that the attorney's negligence was the actual and proximate cause of injury—that but for his attorney's negligence, the proceedings would have turned out differently. See, *e.g.*, *Glaze v. Larsen*, 83 P.3d 26, 30-31 (Ariz. 2004) (citing Restatement (Third) of the Law Governing Lawyers § 53 cmt. d (2000)). Thus, an attorney malpractice claim is different from a false arrest claim, which, as we have explained, may go forward regardless of whether the plaintiff is prosecuted or convicted. An attorney malpractice claim may well be akin to a malicious prosecution claim, where the inability to prove favorable termination precludes recovery. But, as we also explain above, petitioner's Fourth Amendment claim cannot properly be analogized to a claim for malicious prosecution.

Second, petitioner notes that concerns about "'a severe and negative impact on the functioning of the criminal justice system'" occasioned by the early filing of attorney malpractice suits against defense counsel have guided courts when determining accrual for such claims, and he suggests that similar policy-based considerations should dictate the accrual rule applicable to false arrest claims. Pet. Br. 32 (quoting *Glaze*, 83 P.3d at 32). But, the policy-based considerations that support delayed accrual in attorney malpractice cases are not present here. Delayed accrual of attorney malpractice claims is justified, as one of the cases on which petitioner relies explains, because

> [i]f the criminal defendant were required to institute a civil malpractice suit while his case was still pending in the courts, counsel might well be disqualified from

> further handling of the criminal case, or at the very least be discouraged from doing so. It is also quite likely that even if the attorney remains on the case after being made a party in the civil suit, he would be distracted from the job before him by defending against the civil negligence claims.

Glaze, 83 P.3d at 31. Requiring criminal defendants to immediately file false arrest claims raises no concerns about attorney disqualification. To the contrary, a defense attorney may readily prepare the section 1983 claim at the same time he prepares the suppression motion, for both filings will be premised on the same allegations. Nor is there any basis to fear distraction by an attorney involved in both the criminal case and a civil rights case for false arrest—most obviously, because the civil rights case is not against the attorney.

But again, the most fundamental flaw in petitioner's analogy is the same one that infects his reliance on malicious prosecution. As we explain above, Fourth Amendment rights turn on a search or seizure, not an antecedent legal proceeding. Petitioner's reliance on the accrual rule for attorney malpractice cases therefore is misplaced.

B. Damages Associated With A Criminal Prosecution Are Not Available On A Fourth Amendment Claim.

None of petitioner's common-law analogies supports his accrual rule. If anything, the common-law tort of false arrest and imprisonment provides the best analogy to a Fourth Amendment claim—since neither turns on the outcome of ensuing criminal proceedings—but that tort utilizes neither the accrual nor the damages rule urged by petitioner. Of course, any effort to find an analogy in common law for petitioner's Fourth Amendment claim in order to determine what damages are recoverable and when it accrues is necessarily inexact. As this Court has explained, section 1983 "ha[s] no precise counterpart in state law. . . . Therefore, it is the purest coincidence when state statutes or the

common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Wilson*, 471 U.S. at 272 (internal quotations and citation omitted). See also *Heck*, 512 U.S. at 492-96 (Souter, J., concurring in the judgment). Accordingly, "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right" are to be determined "with reference to the nature of the interests protected by the particular constitutional right in question." *Carey v. Piphus*, 435 U.S. 247, 264-65 (1978). And because the Fourth Amendment regulates search and seizure, not unwarranted prosecutions, damages associated with the criminal process are not recoverable under section 1983.

As its text makes plain, the Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.'" *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *Horton v. California*, 496 U.S. 128, 133 (1990). Accord, *e.g.*, *Soldal v. Cook County*, 506 U.S. 56, 66 (1992). Once a criminal prosecution commences, the interests at stake are quite different from those compromised by a constitutionally unreasonable search or seizure.

The purpose of a criminal prosecution is to ascertain the guilt or innocence of the defendant—including, as the exclusionary rule dictates, the admissibility of incriminating evidence. Society has a compelling interest in permitting the full and fair litigation of criminal cases—including its interest in ascertaining whether the antecedent investigation complied with the Fourth Amendment. Thus, it is difficult at best to characterize a criminal prosecution as compromising the interests protected by the Fourth Amendment. The decision of a prosecutor to go forward in the face of a potential Fourth Amendment claim has never itself been considered an affront to Fourth Amendment interests—it merely allows an authori-

tative determination of the criminal defendant's Fourth Amendment rights to be made. In *Gerstein*, for example, the Court rejected the view that the Fourth Amendment entitles "the accused . . . to judicial oversight or review of the decision to prosecute." 420 U.S. at 119. And as we explain in Part I.A above, this Court has made clear that the use of evidence obtained in violation of the Fourth Amendment in a criminal proceeding is not considered an affront to the Fourth Amendment itself—the exclusionary rule is instead justified as a remedy for an antecedent Fourth Amendment violation.

It follows that damages associated with a criminal prosecution are outside the ambit of the interests protected by the Fourth Amendment. Dean Jeffries has observed that when an unreasonable search and seizure produces incriminating evidence,

> [t]he person searched would face the prospect of criminal charge, trial, conviction, and punishment. In some circumstances, the exclusionary rule would bar use of the illegally obtained evidence, but that is not invariably so, and in any event the accusation is in itself injurious. Harms associated with criminal accusation and trial would certainly be foreseeable (indeed, desired) consequences of an unlawful search. If all such injury were compensable, however, the result would be a radical disparity between the kind of harm against which protection is desired (unreasonable invasion of privacy) and the kind of harm for which compensation would be sought (criminal prosecution and trial). A regime compensating individuals for all injury caused by government unconstitutionality would end up awarding money damages to offset losses that should be attributed to (and that are also "but for" caused by) the claimant's own misconduct. The result would be a wealth transfer from society generally to those guilty of criminal wrongdoing. The prospect is peculiar, if not perverse.
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> . . . .

> [I]njury from criminal prosecution can scarcely be considered a societal wrong. Enforcement of the criminal laws is a good thing. The costs imposed on violators are not constitutionally disapproved, but morally right and socially useful. The concern of the fourth amendment is not to curtail criminal prosecution, but to avoid unfounded (and therefore abusive) invasions of privacy. Compensation for violations of the fourth amendment should redress invasions of privacy, not the costs of criminal prosecution.

John C. Jeffries, *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 Va. L. Rev. 1461, 1474-75 (1989) (footnote omitted). The author of the dissenting opinion below has taken the same view. In an opinion on which petitioner otherwise relies, Judge Posner, after observing that "[a] basic principle of tort law . . . is that liability is limited to the harm that the statute or common law doctrine that created the liability was intended to deter," concluded that "the Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions." *Gauger v. Hendle*, 349 F.3d 354, 363 (7th Cir. 2003).[25]

To be sure, Fourth Amendment law aims at the deterrence of unreasonable search and seizure. The exclusionary rule, however, is thought to provide the requisite deterrence, and it is employed in contexts where it is likely to have efficacy as a deterrent. See, *e.g.*, *Hudson*, 126 S. Ct. at 2163; *Scott*, 524 U.S. at 362-63. Indeed, the exclusionary rule has already operated in petitioner's favor in the underlying criminal case against him. Petitioner's reliance on the Fourth Amendment

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[25] In fact, five Circuits have concluded that no damages associated with a criminal prosecution are recoverable on a Fourth Amendment claim. See *Gauger*, 349 F.3d at 362-63; *Hector v. Watt*, 235 F.3d 154, 157-60 (3d Cir. 2000); *Townes v. City of New York*, 176 F.3d 138, 147-48 (2d Cir.), cert. denied, 528 U.S. 964 (1999); *Brooks*, 85 F.3d at 181-82; *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st Cir. 1995).

for a damages remedy for the criminal prosecution—in addition to the damages remedy for his antecedent illegal arrest to which petitioner would concededly be entitled had he brought suit in a timely fashion—is therefore unavailing.

In short, what happens during the course of a criminal prosecution following an allegedly unconstitutional search or seizure simply is not within the scope of the interests for which the Fourth Amendment supports compensation. A Fourth Amendment constitutional tort does not concern itself with the manner in which persons are prosecuted—it is concerned with the antecedent search and seizure. Other constitutional provisions protect against unwarranted prosecutions—including the due process requirements of counsel, reasonable bail, and the right to a speedy and fair trial. See, *e.g.*, *Baker v. McCollan*, 443 U.S. 137, 144-46 & n.3 (1979). But petitioner does not forward a due process claim; only a Fourth Amendment claim is before the Court. Damages associated with a criminal prosecution simply are not recoverable under a constitutional provision that addresses "searches and seizures," and not criminal prosecution. For that reason, there is no justification for delaying accrual of a Fourth Amendment section 1983 claim until a related criminal prosecution has ended.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

ANDRE WALLACE

Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO AND EUGENE ROY,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER ANDRE WALLACE

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REPLY BRIEF FOR PETITIONER

I. Accrual of Petitioner's Claim Is Controlled by *Heck v. Humphrey*

Respondents agree that the Court set out a rule of accrual for §1983 actions in *Heck v. Humphrey*, 512 U.S. 477 (1994), but offer a variety of insubstantial reasons why the *Heck* rule should not apply to this case.

A. Respondents Misconceive the Core Holding of *Heck v. Humphrey*

Respondents attach talismanic significance to the Court's use in *Heck* of the phrase "necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487. In respondents' view, the word "necessarily" limits the *Heck* accrual rule to Fourth Amendment claims which, if successful, would negate an element of the offense charged. (Resp.Br. 24.) The Court should reject this erroneous reading of *Heck*.

The core of *Heck* is "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. When success on a §1983 damage claim would "necessarily" imply the invalidity of a criminal conviction, the §1983 claim does not accrue until the criminal judgment has been set aside, either on direct appeal, in collateral proceedings, or through executive order. *Id.* at 486-87. Although, as respondents note, the Court in *Heck* discussed several hypothetical cases to illustrate "necessarily," 512 at 486-87 nn.6-8, the Court's use of the word "necessarily" is best defined by the facts on which *Heck* was decided.

The petitioner in *Heck* claimed that defendants "conspired and/or acted in concert" to subject him to "an illegal investigation" of his wife's death, "in

violation of the Fourth and Fourteenth Amendments to the United States Constitution." *Heck v. Humphrey*, No. 93-6188, Joint Appendix 3-4. Although the petitioner did not assert that success on this "illegal investigation" would negate an element of the offense, the district court and the court of appeals had viewed Heck's complaint as "challenging the legality of his conviction." *Heck*, 512 U.S. at 480 n.2. While the petitioner sought, in his reply brief in this Court, to dispute this view of his claim, the Court "accept[ed] the characterization of the lower courts" that success on the claim of "illegal investigation" would impugn the criminal conviction.[1] *Id.* Thus, even though Heck sought to disavow any attempt to negate an element of his offense, the Court held that Heck's cause of action would not accrue unless and until his conviction was set aside.

Respondents' reliance on "necessarily" is also inconsistent with the Court's post-*Heck* decision in *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam). There, the Court used "implicitly" in the place of "necessarily," stating:

> In *Heck v. Humphrey*, 512 U.S. 477 (1994), we held that where success in a prisoner's §1983 damages action would *implicitly* question the

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1. Respondents are therefore in error in asserting that Heck "agreed that proof that he was wrongfully convicted was essential to his claim." (Resp.Br. 43.)

> validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.

Muhammad v. Close, 540 U.S. at 751 (emphasis added).

Because any action that challenges the sole evidence supporting a criminal conviction "implicitly" questions the validity of conviction, respondents' reliance on the word "necessarily" is misplaced and entirely irrelevant to the proper accrual rule.

The present case presents an even stronger case than *Heck* for finding that success on petitioner's claim (before his conviction had been reversed and all charges dismissed) would "implicitly question the validity of conviction." Here, petitioner's claim is that he suffered "the 'injury' of being convicted and imprisoned," *Heck*, 512 U.S. at 487 n.7, because respondents violated the Fourth Amendment by exploiting petitioner's unlawful arrest to secure a false confession. Aside from statements allegedly made by "unknown individuals" (J.A. 9), petitioner's confession was the only evidence that linked him to the homicide for which he was held in custody for eight and a half years.[2]

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2. Respondents misread the record when they assert that "at least two witnesses placed petitioner at the crime scene, including one who told the police that he saw petitioner running from the scene after hearing shots." (Resp.Br. 21 n.10.)

First, the eyewitness who testified at trial could not

Petitioner's conviction was overturned for the second time when the state appellate court held that petitioner's confession was the tainted fruit of his unlawful arrest. Thereafter, the prosecution dismissed criminal charges against petitioner because it had no other evidence.[3] Thus, the consequences of success on petitioner's Fourth Amendment claim are clear and indisputable: success on petitioner's §1983 claim before criminal charges were dismissed would have "necessarily impl[ied] the invalidity of his conviction." *Heck*, 512 U.S. at 487.

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identify petitioner as the man he had seen commit the homicide. (J.A. 10.)

Second, other witnesses could only be identified by respondent Roy as "unknown individuals." (J.A. 9.) It is not surprising that the prosecution was unable to call any of these "unknown individuals" at trial.

3. The prosecutor submitted an affidavit in support of respondents' motion for summary judgment, stating that charges would be refiled against petitioner "if additional evidence against him is obtained." (Resp.Br. 2.) This claim was an empty boast because the prosecution failed to obtain any such "additional evidence" in the thirteen month period that elapsed between the second reversal by the state appellate court on August 31, 2001 and the dismissal of criminal charges on October 10, 2002.

B. The Word "Necessarily" Does Not Foreclose Case by Case Determinations

Respondents and amici contend that by using the word "necessarily," the Court in *Heck* intended to foreclose case by case determinations of whether success on a §1983 claim would impugn the integrity of a criminal conviction.[4] This argument cannot be squared with the purpose of *Heck*—to avoid collateral attacks on criminal convictions through a civil damage proceeding—nor with the Court's use of "necessarily" in its decisions distinguishing "structural error," which "necessarily render[s] a trial fundamentally unfair," *Rose v. Clark*, 478 U.S. 570, 577 (1986), from the case by case determination of whether a particular error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

A Fourth Amendment claim which would negate an element of the offense charged, as the Court envisoned in note 6 in *Heck*, is akin to the "structural error" of depriving a criminal defendant of counsel of his (or her) choice that requires reversal of a criminal conviction without assessment of prejudice. *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557, 2564-65 (2006). A Fourth Amendment claim that requires an assessment of whether success on the claim would impugn the integrity of a conviction is analogous to the "wide range of errors," *Arizona v. Fluminante*, 499

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4. Resp.Br. 18-21; State of Illinois Br. 7-11; Nat'l League of Cities Br. 8-17.

U.S. 279, 306 (1991), subject to case by case harmless error analysis.

In all circuits save the Seventh Circuit, courts routinely make a case by case determination of whether success on a Fourth Amendment claim would "necessarily" invalidate a conviction.[5] This commonsense

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5. Respondents erroneously argue that First, Eighth, Tenth, and Eleventh circuits follow the "categorical rule" adopted by the Seventh Circuit in this case. (Resp.Br. 19 n.9.)

Respondents' view of the state of the law in the First Circuit is not shared by district courts in that circuit. *See, e.g., Sholley v. Town of Holliston*, 49 F.Supp.2d 14, 18-19 (D.Mass. 1999) (Fourth Amendment claim barred by *Heck* because success on that claim would undermine criminal conviction); *Davis v. Schifone*, 185 F.Supp.2d 95, 100 (D.Mass. 2002) (same).

Respondents misread *Moore v. Sims*, 200 F.3d 1170 (8th Cir. 2000). There, the claim was that following an arrest without probable cause, the officer had planted drugs on the arrestee. Id. at 1171. The Eighth Circuit held that the "planting evidence" claim was barred by *Heck*, but that a claim based on the arrest—which had not yielded any incriminating evidence—was not. Id. at 1171-72. Respondents also miscite *Anderson v. Franklin*, 192 F.3d 1125 (8th Cir. 1999) as supporting "the same rule embraced by the Seventh Circuit below." (Resp.Br. 19 n.9.) In *Anderson*, the Eighth Circuit affirmed the dismissal of a §1983 false arrest claim as barred by *Heck* because the claimant "has made no showing that his conviction or sentence has been rendered invalid." 192 F.3d 1131.

reading of *Heck* to require case by case determinations has proved to be workable and easily understandable by both the bench and bar.

C. The Accrual Rule Established in *Heck v. Humphrey* Does Not Turn on the Availability of Federal Habeas Relief

Respondents offer the novel argument that the accrual rule of *Heck v. Humphrey* does not apply to §1983 claims arising under the Fourth Amendment because *Heck* only applies to claims which are cognizable in federal habeas corpus proceedings. (Resp.Br. 24-26.) It is not surprising that respondents are unable to cite a single case that has adopted this meritless

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Respondents are in error in asking the Court to ignore footnote three in *Laurino v. Tate,* 220 F.3d 1213, 1217 n.3 (10th Cir. 2000) (*Heck* barred petitioner's false arrest claim until his conviction was invalidated because "all the evidence to be presented was obtained as the result of an illegal arrest") because the Tenth Circuit "miscited" one of its earlier cases. Respondents are also mistaken in reading *Hughes v. Lott,* 350 F.3d 1157 (11th Cir. 2003) as supporting the categorical rule adopted by the Seventh Circuit in this case: The Eleventh Circuit remanded in *Hughes* because the district court had not determined whether "a successful §1983 action for unreasonable search and seizure *necessarily* implied the invalidity of those convictions." *Id.* at 1161 (emphasis in original). This fact specific inquiry is quite different from the categorical rule adopted by the court of appeals in this case.

theory.[6]

Respondents' argument does not make sense in the context of this case, where petitioner has never had any need to seek federal habeas relief because he successfully challenged his conviction on direct appeal. Respondents' proposed limitation on the *Heck* accrual rule would bar any claimant whose conviction was overturned on direct appeal from asserting a §1983 claim because his claim would not be cognizable in a federal habeas proceeding. Petitioner shows below that application of the *Heck* accrual rule in this case is consistent with the nature of petitioner's §1983 claim.

D. Success on Petitioner's Cause of Action Would Have Necessarily Invalidated Any Conviction

Respondents are mistaken in seeking to characterize petitioner's §1983 claim as limited to a challenge to his arrest. (Resp.Br. 38-42.) This is incorrect: Petitioner's cause of action is for "damages attributable to an unconstitutional conviction or sentence." *Heck v.*

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6. This argument is based on a misreading of the record in *Heck*, which shows that the claimant had characterized his claim as arising under "the Fourth and Fourteenth Amendments to the United States Constitution." *Heck v. Humphrey*, No. 93-6188, Joint Appendix 3-4. Heck's Fourth Amendment claim belies respondent's assertions that "Heck asserted no Fourth Amendment claim" (Resp.Br. 43), and "*Heck's* rule of delayed accrual is inapplicable to Fourth Amendment claims." (Resp.Br. 24.)

Humphrey, 512 U.S. 477, 489-90 (1994).

To establish his §1983 claim, petitioner has shown that he was arrested without probable cause, that respondents exploited the unconstitutional arrest to secure a confession, that the confession was introduced at petitioner's criminal trial, and that petitioner was in custody for eight and a half years until, after his confession had been suppressed as the "tainted fruit" of his unconstitutional arrest, the criminal charges were dismissed because, aside from the confession, the prosecution did not have any other evidence probative of petitioner's guilt.

Until his criminal case had been successfully concluded, petitioner could not, without collaterally attacking his conviction, prove that he was unlawfully in custody. Petitioner shows below that respondents' arguments to the contrary are based on the erroneous view that petitioner's cause of action "was complete" when he was arrested.

E. Petitioner's Cause of Action Was Not "Complete" When He Was Unlawfully Arrested

Respondents seek to characterize petitioner's §1983 cause of action as "complete" at the instant they unlawfully arrested him. (Resp.Br. 10.) To support this mischaracterization of petitioner's claim, respondents endorse the Seventh Circuit's view that the Fourth Amendment "drops out of the picture following a person's initial appearance in court," *Hernandez v. Sheahan,* 455 F.3d 772, 777 (7th Cir. 2006), arguing that their responsibility for unlawfully arresting and exploiting the arrest to secure a confession ended when a judge (relying on the confession) set bail. The basis

for this remarkable contention is that "the arrestee [was] then no longer in the detectives' custody." (Resp.Br. 16.) According to respondents, their responsibility for any constitutional violation "was complete once petitioner left their custody." (Resp.Br. 17.) The Court should reject this meritless argument.

Liability under §1983 for the harm caused by exploiting an unlawful arrest to obtain a confession should not turn on concepts of "custody." While a person must be in "custody" to obtain habeas relief, *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968), the concept of "custody"—like that of exhaustion of state remedies—has nothing to do with §1983.

Equally without merit is any suggestion that the setting of bond was an "intervening act" that ended respondents' liability. In *Malley v. Briggs*, 475 U.S. 335 (1986), the Court reaffirmed that a wrongdoer's liability in §1983 actions extends to "the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Accordingly, a police officer who executes a warrant that he (or she) should know was invalid cannot avoid liability by arguing that "the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest."[7] *Malley*, 475 U.S. at 344 n.7.

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7. Nothing in *Malley v. Briggs* suggests that the information submitted to the judge was anything other than a "fair statement of the facts." DAN B. DOBBS, THE LAW OF TORTS 1218 (2001). The contrary suggestion in *Egervary v. Young*, 366 F.3d 238, 248 (3d Cir. 2004) is in error.

Nor are respondents insulated from liability for their wrongdoing because testimony at trial about the confession "was adduced through the Assistant State's Attorney who obtained a written confession from Petitioner after the oral confession in question." (Cook County Br. 6 n.1.) Respondent Kato taught petitioner the story to tell the prosecutor and instructed petitioner not to tell the prosecutor about Kato's promise that petitioner could go home after talking to the prosecutor. Sworn Declaration of Andre Wallace, Exhibit 1 to Record Item No. 31, par. 14(xii).

Respondents correctly point out that criminal cases are not prosecuted by police officers, but by county prosecutors. (Resp.Br. 43, 44 n.23.) While this is true, it is of no consequence when, as in this case, the prosecutor's decision to go forward was based solely on the false confession that respondents had unlawfully obtained. *Jones v. City of Chicago,* 856 F.2d 985, 994 (7th Cir. 1988). Here, the prosecution was "the natural consequence" of respondents' actions, for which they are liable under §1983. *Monroe,* 365 U.S. at 187.

Respondents also seek to compare their conduct in exploiting an unlawful arrest to obtain a false confession with that of an officer who finds contraband while conducting an unlawful search. (Resp.Br. 48.) This comparison is inapt.

The "background of tort liability," *Monroe,* 365 U.S. at 187, prevents a §1983 claimant from being rewarded for his (or her) own misconduct. Thus, a person who "negligently or intentionally" drives into a roadblock—even one that had been erected without probable cause to stop—may not recover damages

under §1983. *Brower v. County of Inyo,* 489 U.S. 593, 599 (1989). Similarly, a person found to be in possession of contraband that is uncovered during an unlawful search is not entitled to damages for being incarcerated until the unlawfully seized evidence is suppressed. *See, e.g., Hector v. Watt,* 235 F.3d 154 (3d Cir. 2000). Arresting a person so that he (or she) may be subjected to coercive interrogation and then holding that person in custody because the interrogation elicited a false confession is quite different than finding contraband during an unlawful search.

Equally inapt is the attempt by amicus (State of Illinois Br. 10-11), to compare this case to *Hudson v. Michigan,* 126 S.Ct. 2159 (2006), where the Court concluded that police officers' failure to "knock and announce" before executing a search warrant did not require the suppression of evidence. *Id.* at 2166-68. Petitioner agrees that a §1983 claim seeking *only* those damages proximately caused by the failure to "knock and announce" would accrue at the time of the unlawful entry. The same would not be true, however, if the claim was that, in addition to the unlawful entry, the police officers had made material false statements to secure the search warrant. *See, e.g., Berman v. Turecki,* 885 F.Supp. 528, 532 (S.D.N.Y. 1995). Success on such a claim would constitute a collateral attack on the criminal conviction and would be barred by *Heck. Id.*

Respondents are also mistaken in characterizing petitioner's cause of action as involving "unwarranted prosecution." (Resp.Br. 5.) While petitioner agrees that he was wrongfully prosecuted, the core of his constitutional claim is that he was subjected to an

involuntary seizure of his person from the date of his arrest until eight and a half years later when, after charges had been dismissed, he was released from custody. As the Fourth Circuit has recognized, these facts state "a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort." *Lambert v. Williams,* 223 F.3d 257, 261 (4th Cir. 2000). Petitioner responds below to respondents' argument that the common law actions of false imprisonment and malicious prosecution are not appropriate starting points for petitioner's §1983 action for damages arising from an unconstitutional conviction.

II. Petitioner's §1983 Action Should Not Be Placed in the Straitjacket of Common Law Forms of Action

Respondents are mistaken in seeking to characterize petitioner's §1983 claim as a common law cause of action for false arrest and imprisonment. (Resp.Br. 38-42.) Petitioner brings the claim which the Court referred to in *Heck v. Humphrey,* 512 U.S. 477 (1994), when it wrote that §1983 provides a "cause of action for damages attributable to an unconstitutional conviction or sentence." Id. at 489-90.

Although the Court had no need in *Heck* to identify the elements of such a cause of action, the Court's recent decision in *Hartman v. Moore,* 126 S.Ct. 1695 (2006) shows that the common law is a mere "starting point," *Carey v. Piphus,* 435 U.S. 247, 258 (1978), for identifying the elements of a cause of action for damages attributable to an unconstitutional conviction or sentence. While the Court has made plain that it is "ready to look at the elements of common-law torts

. . . the common law is best understood here more as a source of inspired examples than of prefabricated components of [§1983] torts." *Hartman,* 126 S.Ct. at 1702.

It was in the context of "inspired examples" that petitioner discussed the common law actions of false imprisonment and malicious prosecution in his opening brief. Respondents take a different approach, and ask the Court to view petitioner's §1983 claim as a common law cause of action for false arrest as that cause of action has been construed in *Broughton v. State of New York,* 37 N.Y.2d 451, 335 N.E.2d 310 (1975) and *Asgari v. City of Los Angeles,* 15 Cal.4th 744, 63 Cal.Rptr.2d 842 (1997). These two relatively recent decisions adopt the dichotomy between false imprisonment and malicious prosecution to which the Court referred in *Heck,* 512 U.S. at 484. Earlier cases, however, followed a different rule.

In *Boaz v. Tate,* 43 Ind. 60, 1873 WL 5266 (1873), a case decided shortly after the enactment of what is now 42 U.S.C. §1983, the Indiana Supreme Court considered the distinction between false imprisonment and malicious prosecution. There, the plaintiff had been arrested without a warrant and without probable cause. After bail had been set, the defendants refused to accept bail and caused other false charges to be filed against the plaintiff. The Indiana Supreme Court held that action was for "false imprisonment, and not for malicious prosecution," because the "the gravamen of the action is for arresting and imprisoning the plaintiff without legal process, and the averments relative to the malicious purposes of the defendants and the circumstances of the arrest and imprisonment are only by

way of aggravation." 1873 WL 5266 *2.

In the same time period, the Wisconsin Supreme Court upheld an award of damages for "mental anguish, pain, suffering, insult, and indignity resulting from . . . imprisonment" in a false imprisonment action. *Fenelon v. Butts,* 53 Wis. 344, 10 N.W. 501, 502 (1881), *appeal following remand for new trial,* 49 Wis. 342, 5 N.W. 784 (1880). The same rule was more recently applied by the Wisconsin Supreme Court in *Lane v. Collins,* 29 Wis.2d 66, 77, 138 N.W.2d 264, 270 (1965), where the court held that "attorney's expenses and mental distress[] are compensable damages in a false imprisonment action." 29 Wis.2d at 77, 138 N.W.2d at 270.

Respondents alternatively argue that the common law action for malicious prosecution is an inappropriate starting point for analyzing petitioner's §1983 cause of action because the state criminal proceedings were not dismissed on grounds of actual innocence. (Resp.Br. 42.) Actual innocence, though, is not uniformly required to establish the "favorable termination" element of a malicious prosecution claim.

As analyzed by the Connecticut Supreme Court in *DeLaurentis v. City of New Haven,* 220 Conn. 225, 250, 597 A.2d 807, 820 (1991), courts have adopted three approaches to the "favorable termination" element. The first requires a verdict of acquittal; the second requires the plaintiff to show that the criminal case had been discontinued on grounds consistent with innocence; the third approach is to accept any outcome other than a finding of guilty, without any plea or consideration from the criminal defendant. This third

approach is the appropriate "favorable termination" standard for a §1983 action brought to obtain damages attributable to an unconstitutional conviction.

The lack of uniformity in the false imprisonment and malicious prosecution cases makes plain that the elements for a §1983 action for damages attributable to an unconstitutional conviction or sentence cannot be identical to those of the common law forms of action. The accrual question presented in this case should be resolved in a manner that reflects the constitutional wrongdoing and which effectuates the purposes of §1983: the cause of action that starts with an unlawful arrest and involves a prosecution based on a confession obtained by exploiting the unlawful arrest should not accrue at the time of arrest "when the defendant commits his wrong," but accrue "when substantial harm matures," *Developments in the Law: Statutes of Limitations,* 63 Harv.L.Rev. 1177, 1200 (1950), i.e., when criminal proceedings have been resolved in favor of the the arrestee.[8]

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8. This rule of accrual is not consistent with respondents' erroneous claim, asserted without the citation of any authority, that "the existence of a potential preclusion defense has never prevented a claim from accruing for purposes of the applicable statute of limitations." (Resp.Br. 12.) Petitioner's proposed rule of accrual is, however, consistent with the accepted and ordinary view that "the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." *Dillon v. Board of Pension Commissioners,* 18 Cal.2d 427, 431, 116 P.2d 37, 39 (1941). *Dillon* is often

III. Respondents' "Stay" Approach Is Inferior to the *Heck* Delayed Accrual Rule and Would Yield Anomalous Results

Respondents assert that the *Heck* accrual rule implicates problems of stale and unavailable evidence that limitations periods are designed to avoid. (Illinois Br. 20.) The same issues would arise, however, under the "stay" approach advocated by amicus (Illinois Br. 20-21), when a §1983 action is placed on an "inactive" docket until the final adjudication of a criminal case. The "stay" approach also flouts the reality that all of the evidence relevant to the §1983 claim will be presented when that same claim is raised in the criminal proceedings. The "stay" approach merely encourages preemptive filings and, if adopted, would clog the already crowded docket of the district courts.

There is also no data to show that the case by case rule applied outside of the Seventh Circuit has opened the floodgates to a plethora of Fourth Amendment claims in those circuits. The assertion by amicus (Nat'l League of Cities Br. 4), that the case by case determination is fraught with "uncertainty" is mere

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cited for the proposition that limitations periods are delayed when a claim is precluded by some other legal process. *See, e.g., Versluis v. Town of Haskell, Okl.*, 154 F.2d 935 (10th Cir. 1946); *Belfer v. Building Com'r of Boston*, 363 Mass. 439, 294 N.E.2d 857 (1973); *CAMAS Colorado, Inc. v. Board of County Com'rs*, 36 P.3d 135 (Colo.App., 2001).

hyperbole: There is no uncertainty that a successful challenge to the lawfulness of an arrest in cases like *Ker v. Illinois*, 119 U.S. 436, 444 (1886) and *Frisbie v. Collins*, 342 U.S. 519 (1952) would not impugn the integrity of a conviction. Nor should there be uncertainty "where the only evidence supporting the conviction is tainted by a possible constitutional violation," *Gibson v. Superintendent of New Jersey Dept. of Law*, 411 F.3d 427, 452 (3d Cir. 2005), as in this case. The latter challenge would be a collateral attack on a criminal conviction.

In respondents' view, "because both filings will be premised on the same allegations," (Resp.Br. 46), petitioner should have filed a §1983 action challenging his arrest when he filed his motion to suppress in the criminal case. Respondents acknowledge that the damages recoverable while the criminal case is pending would be severely limited: A jury would likely award no more than nominal damages. *See, e.g., Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006). Nonetheless, respondents offer the remarkable suggestion that, had petitioner followed this course, he would have somehow been able to obtain "additional damages" after his conviction was reversed. (Resp.Br. 14 n.5.) This argument ignores the timing of this case.

Under respondent's rule, petitioner should have filed a §1983 action against respondents within two years (the duration of the statute of limitations in Illinois for §1983 claims), of his arrest. Because petitioner was under the age of 18 when arrested, he could benefit from the Illinois tolling rule and, using respondents' rule, file his §1983 lawsuit anytime before November 7, 1999, when he became twenty years of

age.

If petitioner had filed his §1983 lawsuit before his trial (which commenced on April 19, 1996)—under respondents' rule that the cause of action had accrued notwithstanding the pendency of the criminal case—the federal action would have been stayed until the conclusion of petitioner's trial. Petitioner was sentenced on May 23, 1996; at that time, the final judgment in the criminal trial would "be res judicata or serve as a basis for an estoppel by judgment, even though such judgment is being appealed." *Wiseman v. Law Research Service, Inc.*, 133 Ill.App.2d 790, 792, 270 N.E.2d 77, 79 (1971). Because state law determines application of res judicata and collateral estoppel in §1983 cases, *Allen v. McCurry*, 449 U.S. 90, 101 (1980), the federal district court considering the §1983 action would be obligated to dismiss the civil rights action.

It was not until September 21, 1998—more than four years after petitioner was arrested—that the state appellate court reversed petitioner's conviction and remanded the case for an attenuation hearing. Petitioner, because less than two years had elapsed from his eighteenth birthday, could still file a §1983 action against respondents, but the civil rights action would be foreclosed shortly after the attenuation hearing on July 21, 1999, when the trial judge reinstated the conviction.

Another two years elapsed before the state appellate court again reversed petitioner's conviction on August 31, 2001, and thirteen months would pass before the prosecution recognized that it had no evidence other than the suppressed confession and dismissed the

criminal case on October 10, 2002. Thus, under respondent's rule, petitioner would have improperly lost his civil claim based on incomplete criminal proceedings that eventually vindicated his view of the false confession. Such an unjustifiable result is avoided by the accrual rule the Court crafted in *Heck*.

CONCLUSION

For the reasons above stated and those previously advanced, the Court should reverse the Seventh Circuit and hold that when a plaintiff in a §1983 action claims that police officers exploited an unlawful arrest to obtain evidence which is the basis for a criminal prosecution, the cause of action arising from the unlawful arrest does not accrue until the criminal charges have been resolved in favor of the arrestee.

October, 2006

Respectfully submitted.

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No. 05-1240

In the Supreme Court of the United States

ANDRE WALLACE,

Petitioner,

v.

CHICAGO POLICE OFFICERS KRISTEN KATO AND EUGENE ROY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE OF COOK COUNTY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?

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INTEREST OF AMICUS

Amicus is the County of Cook, Illinois, the second largest county in the United States. The State's Attorney of Cook County is the chief legal officer for Cook County and is constitutionally and statutorily charged with representing the County in all civil litigation. *County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 831 N.E.2d 563 (2005). Cook County is responsible for paying settlements and judgments in Section 1983 and common law tort actions against the Cook County Sheriff and his deputies. *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 787 N.E.2d 127 (2003). The outcome of the litigation before this Court will impact the civil liability of the Sheriff and his deputies who are sued for alleged wrongful seizures in violation of the Fourth Amendment. Hence, Cook County has an interest in the resolution of this litigation because it bears financial responsibility for paying settlements and judgments in Section 1983 actions against sheriffs and their deputies.

As the legal representative of a unit of state government, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Therefore, Cook County, Illinois respectfully submits this brief as *Amicus Curiae* in support of Respondents in accordance with Supreme Court Rule 37.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented by Respondents Chicago Police Officers Kristen Kato and Eugene Roy.

SUMMARY OF ARGUMENT

The Fourth Amendment was designed by the Framers to protect privacy interests of "the people" in their "persons,

houses, papers, and effects" from unwarranted intrusions by the government. As such, it operates in both the civil and criminal context. However, the Framers enacted an elaborate system of constitutional protections to afford protection against governmental oppression as one "travels through" the continuum of the criminal prosecutorial process. Within this constitutional continuum stands the Fourth Amendment, designed to operate within the pre-trial phase of the proceedings, protecting against unlawful searches and seizures.

The systemic responsibility for the end result of a criminal prosecution is borne by the "trial Amendments"—the Fifth Amendment, the Sixth Amendment, and the Due Process Clause. It is these Amendments that were designed to operate together within the trial phase of a criminal proceeding to ensure a fair trial and, therefore, a just result. As such, any §1983 claims regarding the end result—the conviction and confinement—are properly addressed to these Amendments.

Because of the "implicit habeas exception" for §1983 damages claims set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994), however, any claims that would "necessarily imply" the invalidity of a conviction or confinement are not cognizable unless the "favorable termination" requirement has first been satisfied. These claims, therefore, accrue only upon "favorable termination."

In contrast, the Fourth Amendment bears no constitutional systemic responsibility for the end result of a criminal prosecution. Its role is relegated to the pre-trial phase of the criminal justice system and the Fourth Amendment injury is complete upon the illegal search or seizure—the moment the privacy interest which the Fourth Amendment was designed to protect was offended. Moreover, the "fruit" of the Fourth Amendment violation is suppressed as a judicial sanction to deter the Fourth Amendment unconstitutional

behavior of police officers. The exclusionary rule of the Fourth Amendment is not itself a constitutional right, it is a judicial remedy. Therefore, the use of "fruit" at trial does not effect a new Fourth Amendment violation. The constitutional injury was complete at the time of the initial arbitrary invasion of protectible privacy interests. This remedy cannot be used to distort the Fourth Amendment by dragging it into the trial phase of the proceedings and, thereby, tying it into the validity of a conviction or confinement under *Heck* principals.

Thus, due to the organizational structure of the Constitution, a Fourth Amendment injury is "constitutionally disconnected" from the end result. The Fourth Amendment was designed to operate within the pre-trial sphere and its constitutional injury occurs at the time of the search and seizure. It is an injury to the person or property that is discrete from the conviction and confinement. Therefore, it accrues at the moment the Fourth Amendment interest is offended.

ARGUMENT

THE FOURTH AMENDMENT WAS INTENDED BY THE FRAMERS TO OPERATE WITHIN THE PRE-TRIAL PROCESS, AFFORDING PROTECTION AGAINST UNWARRANTED INTRUSIONS OF PRIVACY INTERESTS. AS SUCH IT IS "CONSTITUTIONALLY DISCONNECTED" FROM THE "TRIAL AMENDMENTS," WHICH WERE DESIGNED TO ENSURE A JUST RESULT. THUS, FOURTH AMENDMENT CLAIMS ACCRUE AT THE MOMENT OF THEIR COMMISSION IN THAT THEY DO NOT "NECESSARILY IMPLY" THE INVALIDITY OF A CONVICTION OR CONFINEMENT, INCLUDING THE INTRODUCTION OF THE "FRUIT" FOUND TO BE OBJECTIONABLE UNDER THE FOURTH AMENDMENT EXCLUSIONARY RULE.

Petitioner's case, as Justice Scalia lamented in *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Scalia, J., concurring), "proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says." Time and time again, this Court has been called upon to correct these "all-too-common assumptions"—the seeds that, ultimately, drag their constitutional roots into areas far-afield from the Framers' original intendment. Simultaneously, this process operates as a systemic distortion of the Constitution itself—pressing Amendments into service where they were unintended to operate and, thereby, displacing others designed to do the assigned task. Under the guise of tort law, Petitioner draws upon this distorted process in order enlist the Fourth Amendment to compensate him for a host of alleged "constitutional injuries" which arise at discrete moments of the prosecutorial process. This Court has shown no hesitancy of late in restoring various Amendments to their natural order within the criminal prosecutorial system

envisioned by our Framers. *Amicus* asks this Court to now do so in the context of the Fourth Amendment.

Looming over this entire discussion is Title 42 U.S.C. § 1983, intended to "[create] a species of tort liability in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 254 (1978). The common thread implicitly running throughout both Petitioner's "Fourth Amendment-based" argument (Pet. Br. at 17-23) and his alternative common law tort-based argument (Pet. Br. at 23-32) is that, applying "accepted and ordinary principles of causation," the causal chain, beginning with his arrest by Respondents, ought to encompass his conviction and confinement as "the natural consequences of respondent's actions." (Pet. Br. at 8, 17, 23, 28-29) What Petitioner's argument fails to countenance is that § 1983, "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 (1979).

Thus, while §1983 most assuredly "confers a general remedy for injuries to personal rights" (*Wilson v. Garcia*, 471 U.S. 261, 278 (1985)) that "should be read against the background of tort liability" (*Monroe v. Pape*, 365 U.S. 167, 188 (1961)), it "only provides a remedy and does not itself create any substantive rights." *Wilson v. Garcia*, 471 U.S. 261, 278 (1985). "§1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker*, 443 U.S. at 146. This statute should not now, through tort-based concepts of "Mrs. Palsgraf-type causation," be employed to distort the scope and purpose of the Fourth Amendment—the sole federal right upon which Petitioner predicates his claim.

Before turning to the merits of the argument, however, it is appropriate to identify with precision the operative

premises of the instant cause. Petitioner brought a federal claim for damages under §1983, seeking compensation for his state court conviction and confinement, which were ultimately overturned during the state direct appeal process. The state court found that, at some point during defendant's stay at the police station, his initial voluntary accompaniment ripened into a full blown arrest without the requisite probable cause. The confession Petitioner made, therefore, was suppressed as "fruit of the poisonous tree" pursuant to the Fourth Amendment exclusionary rule. The prosecution, thereafter, *nolled* the charges against Petitioner. Petitioner now seeks civil money damages from Respondents alone, the police officers who arrested Petitioner and obtained his confession.[1] He does so solely through the vehicle of the Fourth Amendment and its exclusionary rule. There is no issue in this case regarding an involuntary confession in violation of the Fifth Amendment.[2] The sole constitutional objection to Petitioner's confession is the "fruit relationship" it bore to his unlawful arrest.

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[1] Petitioner asserts no instances of "unconstitutional behavior" on the part of Respondents-officers outside of their pre-trial role in arresting and obtaining an oral confession from Petitioner at the station. Indeed, at trial, the testimony regarding Petitioner's confession was adduced through the Assistant State's Attorney who obtained a written confession from Petitioner after the oral confession in question.

[2] Petitioner concedes that "the voluntariness of the confession is not before the Court." (Pet. Br. at 11, n. 5) Nonetheless, throughout his brief he intimates that both his statement and Respondents' actions in obtaining it were unconstitutional on grounds other than the Fourth Amendment and its accompanying exclusionary remedy (See, *e.g*, Pet. Br. at 33 ("police officers exploited an unlawful arrest to secure a false confession")) in contravention of preclusion principles. See *Allen v. McCurry*, 449 U.S. 90 (1980).

The question before this Court, thus, asks: "When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?" The accrual date, obviously, is significant because of the "implicit habeas exception" to cognizable §1983 claims (*Wilkinson v. Dotson*, 544 U.S. 74, 82 (2004)), represented by *Heck v. Humphrey*, 512 U.S. 477 (1994) in this instance due to Petitioner's requested money damages. In order to effectuate "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments" (*Heck*, 512 U.S. at 485), *i.e.*, to prevent prisoners from end-running habeas proceedings, *Heck* required that "§1983 damages actions that *necessarily* require the plaintiff to prove the unlawfulness of his conviction or confinement" were not cognizable. *Heck*, 512 U.S. at 485, 486-487 (emphasis added).

More specifically, the "implicit habeas exception" effected by *Heck* and related cases seeks to prohibit litigants from "evad[ing the exhaustion] requirement [of habeas proceedings] by the simple expedient of putting a different label on their pleadings." *Preiser v. Rodriguez*, 411 U.S. 475 (1973). However, if "a judgment in favor of the plaintiff would [not] *necessarily* imply the invalidity of his conviction or sentence" then the §1983 action is not really a habeas proceeding masquerading as a civil tort action and, therefore, "the action should be allowed to proceed, in the absence of some other bar to the suit." *Heck*, 512 U.S. at 487 (footnotes omitted).[3] As will be demonstrated, when Petitioner's

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[3] Petitioner's concern about "the needless filing of innumerable false arrest claims" overcrowding federal dockets (Pet. Br. at 32-33) begs the question. §1983 is "an independent federal remedy"

(continued...)

claims are properly scrutinized, his compensable Fourth Amendment injuries, are not, legally-speaking, indirect challenges to his conviction or confinement.

Petitioner would like this Court to fold the entirety of the criminal process into the Fourth Amendment. However, "The Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be dissevered from the rest of the Constitution." *Reid v. Covert*, 354 U.S. 1, 44 (1957) (Frankfurter, J., concurring). "The Constitution and the Amendments in the Bill of Rights [set forth] safeguards designed to protect defendants against oppressive governmental practices * * *." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955). These "safeguards"—the component parts of the various constitutional amendments—combine synergistically to create our adversary system of criminal justice. The Constitution, as a whole, was designed by the Framers to *systemically* guard

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(...continued)
and "unless that remedy is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had [*e.g.*, habeas proceedings] it cannot be assumed that Congress wishes to hold open the independent federal remedy during any period of time necessary to pursue alternative state-court remedies." *Bd. of Regents of the Univ. of the State of New York v. Tomanio*, 446 U.S. 478, 490-491 (1980). Moreover, both habeas itself and the *Heck* "implicit habeas exception" principle designed to protect it already represent a balance of principles of comity and federalism. see *Williams v. Taylor*, 529 U.S. 420 (2000); *Wilkinson v. Dotson*, 544 U.S. 74, 84 (2005). In this regard, *Heck* itself recognized abstention as "an appropriate response to the parallel state-court proceedings" (*Heck*, 512 U.S. at 487, n. 8) and this Court, in *Hardin v. Straub*, 490 U.S. 536, 544 (1989) recognized that "many prisoners are willing and able to file §1983 suits while in custody." The Fourth Amendment cannot be distorted out of convenience to a federal court.

against governmental oppression—a system that operates most effectively when each provision operates within its own intended sphere, combining numerous and distinct Amendments for its efficacy.

However, as one "travels through" the criminal prosecutorial process, from arrest to conviction and confinement, distinct Amendments play different roles along the way—depending on the purpose for which our Framers designed them. Moreover, the "Thou shalt nots" (*Reid*, 354 U.S. at 9) of the various Amendments target various "actors" within the prosecutorial process with their intended constraint. As this Court recognized long ago, "The complicated process of criminal justice is [ ] divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U.S. 332, 343 (1943).

Indeed, §1983 common law-derived immunities principles recognize precisely this point. Determining that "the common law provided absolute immunity from subsequent damages liability for all persons * * * who were integral parts of the judicial process" (*Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)), this Court essentially ordered the §1983 immunities of the various actors around their function within the system and that function's relationship to the judicial trial process. For instance, an officer testifying at trial (even if he offers perjured testimony) is afforded absolute immunity (*Briscoe v. LaHue*, 460 U.S. 325, 333 (1983)) along with a prosecutor " 'in initiating a prosecution and in presenting the State's case'." *Burns v. Reed*, 500 U.S. 478, 486 (1991) (citation omitted). In both instances, the conduct is " 'intimately associated with the judicial phase of the criminal process.'." *Burns*, 500 U.S. at 486 (citation omitted). As such, "the truthfinding process is better served" (*Briscoe*, 460 U.S. at 333-334) by considerations in favor of

the immunities because "the judicial process is largely self-correcting." *Mitchell v. Forsyth*, 472 U.S. 511, 522 (1985).

In contrast, an officer operating within his intended pre-trial Fourth Amendment sphere is only afforded qualified immunity. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). Thus, for example, an officer is only qualifiedly immune for his role in obtaining an unconstitutional arrest warrant. *Malley v. Briggs*, 475 U.S. 335, 344 (1986). This Court, moreover, refused to extend similar immunities to the officer applying for a warrant as that afforded a prosecutor seeking an indictment because the officer's action, "while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings." *Malley*, 475 U.S. at 342-343. Similarly, a prosecutor is only qualifiedly immune for advising the police in the investigative phase of a criminal case because such action is not "intimately associated with the judicial phase of the criminal process." *Burns*, 500 U.S. at 493. This Court noted that "one of the most important checks, the judicial process, will not necessarily restrain out-of-court activities by a prosecutor that occur prior to the initiation of a prosecution." *Burns*, 500 U.S. at 496.

The §1983 immunities principles, ordered around the proximity to the judicial process of the particular actor and function, effectively parallel the constitutional ordering within the criminal justice system. Immunities are given greatest sway within the judicial process precisely because the Constitution itself contains a compendium of rights, operative during the judicial process, to ensure the accuracy of the truth-seeking process. It is the Amendments pressed into service during the trial phase of the criminal prosecution—the Fifth Amendment, the Sixth Amendment, the Due Process Clause (both procedural and substantive) and, combinations thereof (see *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (jury trial right, in conjunction with due process

proof beyond a reasonable doubt requirement))—that are designed to ensure the accuracy of the final result. These rights operate within the trial sphere of a criminal prosecution and combine to fulfill their responsibility to ensure a fair trial.

The Fifth Amendment's Self Incrimination Clause, for example, applicable by its text when a "person" is "compelled in a criminal case to be a witness against himself," is not violated "absent use of the compelled statements in a criminal case against the witness" (*Chavez v. Martinez*, 538 U.S. 760, 769 (2003)), although an "essential predicate" is a pre-trial custodial interrogation (*Mayle v. Felix*, 545 U.S. 644, 125 S.Ct. 2562, 2573 (2005)). While *Miranda* warnings are required during pre-trial interrogation (*Miranda v. Arizona*, 384 U.S. 436 (1966)), "[t]he Court made it clear that the basis for decision was the need to protect the fairness of the trial itself." *Schneckloth v. Bustamonte*, 412 U.S. 218, 240 (1973).

The Sixth Amendment, moreover, affords to, according to its text, "the accused" "in all criminal prosecutions" a "compact statement of the rights necessary to a full defense" which "are basic to our adversary system of criminal justice." *Faretta v. California*, 422 U.S. 806 (1975); See, *e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004) ("the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure and particularly its use of *ex parte* examinations as evidence against the accused"). While the Sixth Amendment right to counsel does reach back into the pre-trial process, it does so only upon initiation of "adversary judicial criminal proceedings"—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); see *Sweat v. Arkansas*, 469 U.S. 1172, 1176 (1985). Nonetheless, "the 'trial' guarantees that have been applied to the 'pretrial' stage of the criminal

process are similarly designed to protect the fairness of the trial itself." *Schneckloth*, 412 U.S. at 238-239.

Finally, these trial Amendments are rounded out by the free-roving Due Process Clause, both procedural and substantive.[4] For example, it is this Clause that commands proof beyond a reasonable doubt for a constitutionally adequate conviction. See *In re Winship*, 397 U.S. 358 (1970); see also *Apprendi*, 530 U.S. 466.

Petitioner could premise his claim for damages upon these trial Amendments, if he so chose. It is these Amendments that were designed to guard against the injuries he alleges—an unconstitutional conviction or sentence. Moreover, had he brought his claims under the appropriate Amendments, he would have been timely in that "a §1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated" (*Heck*, 512 U.S. at 490) because of the *Heck* "implied habeas exception" discussed above. However, Petitioner obviously realizes he can achieve no economic recourse for his conviction and confinement by premising his claim upon any of these trial Amendments, due to §1983 immunities principles discussed above.

As such, he has attempted to fold his "unjust end result injuries" into the Fourth Amendment, a wholly distinct protection. Just because he runs up against principals of immunity, however, does not mean that another constitutional provision should be distorted to suit his needs. His claims cannot find a home in the Fourth Amendment

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[4] The Due Process Clause also operates outside of the trial phase of criminal proceedings, governing, for example, the actions of an officer in a high-speed automobile chase aimed at apprehending a suspected offender. see *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

because this provision was designed to afford protection against injuries distinct from the "unjust end result injuries" defendant is now trying to shoehorn into it. As will be seen, true Fourth Amendment injuries occur during the pre-trial process, at the time of the unconstitutional search, seizure, or pre-trial detention. Because of the Fourth Amendment's "constitutional unconnectedness" to the trial phase of a criminal prosecution, §1983 claims premised upon this species of constitutional injury accrue at the time of occurrence and are not subject to the *Heck* "implicit habeas exception."

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. Amend. IV.

It applies to "the people," in general and, unlike the Fifth and Sixth Amendments, is not even necessarily tied into the criminal prosecutorial process. The Fourth Amendment's "protection applies in the civil context as well." *Soldal v. Cook County*, 506 U.S. 56, 67 (1992). Its "guarantees are triggered by governmental searches and seizures 'without regard to the use to which [houses, papers, and effects] are applied'." *Soldal*, 506 U.S. at 67 n. 11 (citation omitted). It would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530 (1967); see *Weeks v. United States*, 232 U.S. 383, 392 (1914) (The Fourth Amendment's "protection reaches all alike, whether accused of crime or not").

Thus, for this reason alone, it is nonsensical, to say the least, to suggest that a §1983 plaintiff must wait until his conviction or confinement has been overturned for his Fourth Amendment claim to accrue. Under Petitioner's reasoning, this broad swath of "civil innocents"—clearly protected by the Fourth Amendment—cannot ever bring §1983 money damages claims against state officials who violate their Fourth Amendment rights. But see *Soldal*, 506 U.S. 56 (§1983 cause of action based upon unconstitutional seizure of mobile home in eviction proceedings). It is impossible to achieve a "favorable termination" of a conviction and/or confinement that never took place.

In the criminal prosecution context, "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright v. Oliver*, 510 U.S. 266, 274 (1994). "The Fourth Amendment covers [] 'searches and seizures,'" and, therefore, under the "more-specific-provision rule" of *Graham v. Connor*, 490 U.S. 386 (1989) (*County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998)), Petitioner's complaint relating to his unlawful arrest and all other §1983 claims contesting "searches and seizures" must be brought under the Fourth Amendment.

That does not mean, however, that Petitioner's claims regarding his conviction and confinement can also be vindicated under this Amendment, as well. "The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." *Schneckloth*, 412 U.S. at 242. The Fourth Amendment "'is not an adjunct to the ascertainment of truth.' The guarantees of the Fourth Amendment stand 'as a protection of quite different constitutional values—values reflecting the concern of our society for the right to be let alone.'" *Schneckloth*, 412 U.S. at 242, quoting *Tehan v. United States ex rel. Schott*, 382 U.S. 406, 416 (1966). "There is a vast difference between those rights

that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." *Schneckloth*, 412 U.S. at 241; see *Haring v. Prosise*, 462 U.S. 306, 322 (1983) (petitioner allowed to pursue a §1983 Fourth Amendment claim despite a guilty plea because his "Fourth Amendment claim is irrelevant to the constitutionality of his criminal conviction"). The Fourth Amendment was designed to afford "protection from unfounded interference with liberty" in the pre-trial phase of a criminal prosecution. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). As such, "the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." *Gerstein*, 420 U.S. at 125, n. 27. "[T]he umbrella of the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution." *Castellano v. Fragazo*, 352 F.3d 939, 959 (5th Cir. 2003).

In contrast with the trial Amendments, which serve to ensure a just end result, "the security of one's privacy against arbitrary intrusion by the police [] is at the core of the Fourth Amendment." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). "The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong * * * is fully accomplished by the original search [or seizure] without probable cause." *United States v. Calandra*, 414 U.S. 338, 354 (1974). That is why the *Heck* Court properly acknowledged that " 'If there is a false arrest claim, damages for that claim cover the time of detention up until the issuance of process or arraignment, but not more.' W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 888 (5th ed. 1984)." *Heck*, 512 U.S. at 484; see *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 899 (7th Cir. 2001) ("damages for false arrest are free-standing

and completely independent from any damages caused by a subsequent prosecution or conviction").

In short, the Fourth Amendment injury occurs prior to and is wholly unrelated to the trial process itself. It protects privacy-based interests and the constitutional ramifications for the aggrieved person are felt immediately and are, therefore, actionable immediately. To suggest that the accrual of these rights must await overturning a conviction or confinement due to the fact that these claims "necessarily imply" the invalidity of the conviction or confinement calls into question some well-established principles of law such as, for example, "[T]he established rule that illegal arrest or detention does not void a subsequent conviction." *Gerstein*, 420 U.S. at 119, citing *Frisbie v. Collins*, 342 U.S. 519 (1952). Moreover, "a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein*, 420 U.S. at 866. If the Fourth Amendment violation is "constitutionally disconnected" to the conviction in these contexts, it must also be "disconnected" in the §1983 money damages context, as well.

Specifically with reference to §1983 damages actions "arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment," to impose the *Heck* "favorable termination" requirement "would [ ] cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination—suits that could otherwise have gone forward had the plaintiff not been convicted." *Nelson v. Campbell*, 541 U.S. 637, 647 (2004). According to principles of §1983, a legitimately convicted person is just as entitled to redress his Fourth Amendment injuries as one who, ultimately, succeeds in overturning his conviction. To hold off accrual until "favorable termination" would, effectively, forever preclude the legitimately convicted person such redress.

This Court was "careful in *Heck* to stress the importance of the term 'necessarily'" (*Nelson*, 541 U.S. at 647) in fashioning its "implicit habeas exception." This Court reiterated that it "acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to §1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not '*necessarily* imply that the plaintiff's conviction was unlawful.' [*Heck*,] 512 U.S., at 487, n. 7, 129 L.Ed.2d 383, 114 S.Ct. 2364 (noting doctrines such as inevitable discovery, independent source, and harmless error)." *Nelson*, 541 U.S. at 647. As such, the introduction of Petitioner's confession, constitutional in all regards save for its "fruit" relationship to the unlawful arrest, would not have *necessarily* implied the invalidity of his conviction or confinement had he brought it when it accrued. It is the existence of the exclusionary doctrines *vel non*, not their factually specific application in each case, that satisfies the "not necessarily" requirement for immediate accrual.

Nor should the introduction of the "fruits" of a Fourth Amendment violation (See, *e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)) at trial be perceived to effect a new constitutional injury under the aegis of the Fourth Amendment. The Fourth Amendment exclusionary rule received an inauspicious start as a "rule of evidence for federal criminal trials." *McNabb v. United States*, 318 U.S. 332, 341 (1943). From there it has traveled a rather turbulent path, engendering much disagreement amongst members of the Court in terms of both its substance and its efficacy. "The debate within the court on the exclusionary rule has always been a warm one. It has been unaided, unhappily, by any convincing empirical evidence on the effects of the rule." *United States v. Janis*, 428 U.S. 433, 446 (1976) (footnote omitted).

As it evolved from its initial imposition upon the States through the Due Process Clause (*Mapp v. Ohio*, 367 U.S.

643, 648 (1961)), this Court has come to view the Fourth Amendment exclusionary rule as a "procedural weapon that has no bearing on guilt." *Linkletter v. Walker*, 381 U.S. 618, 628 (1965). Rather, it is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. This Court's "later cases have emphasized that the issue of exclusion is separate from whether the Fourth Amendment has been violated and exclusion is appropriate only if the remedial objectives of the rule are thought most efficaciously served." *Arizona v. Evans*, 514 U.S. 1, 13-14 (1995) (citations omitted).

Premised on this rationale, this Court has, essentially, cabined the operative field of the Fourth Amendment exclusionary rule within the trial/direct appeal process of a criminal prosecution. See, *e.g.*, *United States v. Janis*, 428 U.S. 433 (1976) (exclusionary rule not extended to preclude use of evidence seized by state officer in good faith, albeit unconstitutionally, in civil proceeding by or against the United States); *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998) (exclusionary rule does not apply in parole revocation hearings). In fact, this Court has explicitly stated, ""We are asked to extend the operation of the exclusionary rule beyond the criminal trial context. We again decline to do so." *Pennsylvania Board of Probation and Parole*, 524 U.S. at 364.

Similarly, the exclusionary rule is riddled with exceptions within the trial/direct appeal process itself. See, *e.g.*, *United States v. Leon*, 468 U.S. 897 (1984) (modifies exclusionary rule to exempt evidence obtained by officers in good faith reliance upon a search warrant from its reach); *New York v.*

Harris, 495 U.S. 14, 17 (1990) (modifies exclusionary rule to exempt statements made outside home from the reach of a *Payton* violation within the home); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (modifies exclusionary rule to exempt evidence obtained from a source independent of the Fourth Amendment violation); *Calandra*, 414 U.S. 338 (modifies exclusionary rule to exempt questions during grand jury based on illegally obtained evidence). Most recently, this Court jettisoned the exclusionary rule from Fourth Amendment knock and announce principles altogether because "resort to the massive remedy of suppressing evidence of guilt is unjustified." *Hudson v. Michigan*, 126 S. Ct. 2159, 2168 (2006).

"The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). "Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure * * *." *Stone v. Powell*, 428 U.S. 465 (1976). Thus, "the use of fruits of a past unlawful search or seizure '[works] no new Fourth Amendment wrong.' The wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself and the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'." *United States v. Leon*, 468 U.S. 897, 906 (1984) (citations omitted). "[T]he violation is complete by the time the evidence is presented to the court." *United States v. Janis*, 428 U.S. 433, 458 n. 35 (1976).

The Fourth Amendment wrong is complete at the time of the action forbidden by the Fourth Amendment itself, not when the "fruits" are introduced at trial. The introduction of the "fruit" of the violation effects no new constitutional injury. As such, it cannot extend the scope of the Fourth

Amendment violation, complete onto itself, into the trial phase of the prosecution. Its injury is complete upon its occurrence and the suppression of the "fruit" at trial is, in reality, a constitutional windfall for the defendant. §1983 does not create substantive rights; it only affords a federal remedy. A claim, therefore, premised on the Fourth Amendment must be judged by that Amendment's design and purpose. As established above, Fourth Amendment injuries are complete when the privacy interests of "the person" are infringed—not when the "fruits" are introduced at trial. There is no new Fourth Amendment injury and the action, therefore, accrues at the time of the illegal search or seizure. See also *Townes v. City of New York*, 176 F.3d 138, 146 (2nd Cir. 1999) ("[A]llowing * * * §1983 actions to proceed solely on a fruit of the poisonous tree theory of damages would vastly overdeter state actors" in contravention of the very principles upon which the Fourth Amendment exclusionary rule is based).

Additionally, because the Fourth Amendment was designed to operate in both the civil and criminal arenas, practical problems would result should this Court accept Petitioner's view of the Fourth Amendment injury. A civil litigant does not have the benefit of the Fourth Amendment exclusionary rule; although he suffered a Fourth Amendment violation just as his criminal counterpart did. Therefore, his Fourth Amendment injury would certainly accrue at the time of the illegal search or seizure. Due to its unavailability in the civil context, the Fourth Amendment "fruit" principal cannot drag the time of occurrence of the constitutional injury into the trial context for the civil litigant. It should not, therefore, be permitted to distort the Fourth Amendment injury in the criminal scenario, either. "The fruit of the poisonous tree doctrine is not available to elongate the chain of causation" for the discrete Fourth Amendment pre-trial injury. *Townes v. City of New York*, 176 F.3d 138, 146 (2nd Cir. 1999). "[D]amages for an unlaw-

ful search should not extend to post-indictment legal process, for the damages incurred in that process are too unrelated to the Fourth Amendment's privacy concerns." *Hector v. Watt*, 235 F.3d 154, 157 (3rd Cir. 2000).

Along similar lines, Petitioner's version of the Fourth Amendment would occasion logical problems with *Heck* itself. *Heck* sought to channel claims that were appropriately habeas claims, *i.e.*, claims for money damages that, in actuality, challenged the conviction or confinement, through the "procedural limitations of the federal habeas statute." *Nelson*, 541 U.S. at 647. Prisoners, however, are not even allowed to relitigate Fourth Amendment unlawful search or seizure claims in habeas proceedings. *Stone v. Powell*, 428 U.S. 465 (1976). Nonetheless, if Petitioner's claim that the Fourth Amendment injury is "constitutionally connected" to the conviction and confinement, a §1983 claimant-prisoner whose conviction was legitimate but, yet, had suffered a Fourth Amendment injury would be sent through the habeas process by virtue of *Heck*. However, on the habeas end, he would be prohibited from litigating his Fourth Amendment claim. Surely, *Heck* must not be interpreted in this fashion to effect such a futile, senseless result. For this reason, as well, the view that Petitioner's Fourth Amendment claim accrued at the time of the unlawful arrest—not after the conviction and confinement were overturned—is the only one that makes any sense in both the realm of the constitution and pragmatism.

In essence, Petitioner's request to treat conviction and confinement—the end results of the entire system—as uniquely Fourth Amendment injuries, effects a distortion of the purpose and scope of this Amendment. To interpret the Clause in the manner Petitioner advocates would drag it out of its natural role within the Constitutional scheme envisioned by the Framers. The Fourth Amendment was designed to operate within the pre-trial sphere, protecting privacy interests of "the

people." The Fourth Amendment injury, therefore, is complete and, thus, accrues, when that privacy is violated. The exclusionary remedy cannot act to convert the Fourth Amendment into a trial right and, therefore, artificially alter its accrual time.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment in *Wallace*, No. 05-1240.

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IN THE

Supreme Court of the United States

ANDRE WALLACE,

Petitioner,

v.

CHICAGO POLICE OFFICERS KRISTEN KATO AND EUGENE ROY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in the development of clear rules to govern the fundamentals of section 1983 litigation, including the rules that govern the accrual of causes of action, such as petitioner's damages claim for false arrest.

When this Court decided the closely related question of the proper statute of limitations for section 1983 claims, it emphasized "the federal interest in uniformity and the interest in having 'firmly defined, easily applied rules.'" *Wilson v. Garcia*, 471 U.S. 261, 270 (1985) (citation omitted). "A federal cause of action 'brought at any distance of time,'" the Court said, "would be 'utterly repugnant to the genius of our laws,'" not least because "[j]ust determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Id.* at 271 (citation omitted). Moreover, the Court noted that those courts "that have predicated their choice of the correct statute of limitations on analysis of the particular facts of each claim" had used an approach that "inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983." *Id.* at 272.

Certainty and clear rules are no less vital for litigants and the courts in determining the accrual of false arrest and other search and seizure claims. The court of appeals properly accommodated these concerns when it ruled that false arrest claims accrue at the time of arrest. Because of the importance of this question to the fair and effective litigation of section

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

1983 claims such as those of petitioner, *amici* respectfully submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

The Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), does not require any departure from the traditional federal rule that an action for false arrest accrues at the time of arrest. *Heck* is best read as embracing a general rule that false arrest damages claims do not necessarily imply the invalidity of a conviction, that section 1983 false arrest damages actions "should be allowed to proceed, in the absence of some other bar to the suit," *id.* at 487 (footnote omitted), and that federalism issues that may be raised by the filing of federal civil rights cases while state proceedings are ongoing are to be resolved as a matter of comity.

An alternative reading of *Heck*, directing courts to make case-by-case, fact-specific determinations whether an arrest implies the invalidity of a conviction, and consequently delaying the accrual of selected false arrest actions until a conviction is set aside, imposes a needless and costly burden on federal courts and litigants. Delayed accrual based on the facts of the case is "at odds with the basic policies of all limitations provisions," *Rotella v. Wood*, 528 U.S. 549, 555 (2000), and "breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983." *Wilson v. Garcia*, 471 U.S. 261, 272 (1985).

1. In "the normal run of cases, in which the Fourth Amendment violation affects only the evidence that might or might not be presented to the trier of fact," Pet. App. 14, *Heck* is best read as establishing a general rule that claims for damages arising out of a false arrest do not "necessarily" imply the invalidity of a conviction. There is, then, no reason to depart from the clear, well-settled rule that an action for false arrest accrues at the time of arrest.

Heck identified "a suit for damages attributable to an allegedly unreasonable search" as an example of a section 1983 damages action that "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment" and that "should be allowed to proceed, in the absence of some other bar to the suit." 512 U.S. at 487 & n. 7 (footnote omitted). The Court explained that "even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction," success on the merits of an unreasonable search claim "would not *necessarily* imply that the plaintiff's conviction was unlawful" because of "doctrines like independent source and inevitable discovery, and especially harmless error." *Id.* at 487 n. 7 (citations omitted).

The Court's focus on "the importance of the term 'necessarily,'" *Nelson v. Campbell*, 541 U.S. 637, 647 (2004), supports reading *Heck* for the general rule that damages claims arising out of a false arrest or other prohibited seizure do not imply the invalidity of a conviction. The absence of probable cause is, to be sure, a starting point for arguments that the fruits of an arrest are tainted, that the tainted fruit is inadmissible, and that the tainted fruit would be critical to a conviction. A finding of no probable cause, however, does not "necessarily," inevitably, or unavoidably imply that a conviction is invalid. *See Heck*, 512 U.S. at 487 n. 7; *cf. Webster's Third New International Dictionary of the English Language, Unabridged* 1510 (Phillip Babcock Gove ed., 1976) ("necessarily" means "inevitably, unavoidably").

Because *Heck* teaches that damages for false arrest do not "necessarily" go to the validity of conviction, there is no need for any mechanism—delayed accrual or otherwise—to police the intersection of a section 1983 damages action for false arrest and habeas corpus because there is no interference. Damages for false arrest do not go to the validity of a conviction and do not implicate any requirement "to resort to

state litigation and federal habeas before § 1983." *Muhammad v. Close*, 540 U.S 749, 751 (2004) (per curiam). Although a section 1983 damages action for false arrest does not interfere with federal habeas corpus, it may raise, as *Heck* anticipated, other significant federalism issues. *Heck* specifically stated that a section 1983 action "should be allowed to proceed" only "in the absence of some other bar to the suit" and carefully noted that concerns about comity, and in particular avoidance of parallel federal and state court proceedings, may require abstention. 512 U.S. at 487 & n. 8.

2. Case-by-case consideration of the relationship of a false arrest claim to a possible conviction creates significant problems that are obviated by reading *Heck* as embracing a general rule that false arrest damages claims do not necessarily imply the invalidity of a conviction. Under the case-by-case approach, courts must make fact-specific determinations of whether success on the merits of a claim that an arrest was made without probable cause would necessarily invalidate a conviction. If a successful false arrest claim does not imply the invalidity of a conviction, the action accrues at arrest, but if success on the merits of the claim does imply the invalidity of a conviction, the action accrues when the conviction is set aside.

Faced with such uncertainty, prudent lawyers will always file actions for false arrest based on the presumption that the action accrues at the time of arrest. To file a section 1983 action after a conviction is set aside would run the risk that the court will decide that a successful false arrest claim did not imply the invalidity of the conviction, that the action in fact accrued at arrest, and that if the limitations period has run, some variant of equitable tolling—an exceptional doctrine—will be necessary to preserve the section 1983 action.

Delayed accrual of false arrest actions conflicts with the fundamental "policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's

opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555. Petitioner's case was filed more than nine years after his arrest, and "[j]ust determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson*, 471 U.S. at 271. Statutes of limitations in section 1983 actions are at least as long as two years in all but four states and Puerto Rico, and afford plaintiffs ample time to present their claims. Petitioner's false arrest claim accrued at the time of arrest, and his section 1983 complaint advanced a claim that he could have asserted within Illinois's two-year limitations period.

Because a statute of limitations does not begin to run until an action accrues, a rule that would delay accrual beyond the time of arrest is inconsistent with legislative judgments about "the proper balance between the policies of repose and the substantive policies of enforcement." *Wilson*, 471 U.S. at 271.

ARGUMENT

I. A SECTION 1983 CLAIM FOR DAMAGES FOR FALSE ARREST ACCRUES AT THE TIME OF ARREST

A Fourth Amendment claim for damages arising out of false arrest does not implicate any requirement under *Heck v. Humphrey*, 512 U.S. 477 (1994), "to resort to state litigation and federal habeas before § 1983" because it "threatens no consequence for [a prisoner's] conviction or the duration of his sentence." *Muhammad v. Close*, 540 U.S. 749, 751-52 (2004) (per curiam). Although a finding of no probable cause for arrest might be "a necessary element to a likely challenge to a conviction," *Heck*, 512 U.S. at 488 (internal citation and quotation marks omitted), it would not be a sufficient element to support invalidation of a conviction. A determination in a section 1983 damages action whether an arrest or other

seizure is prohibited by the Fourth Amendment does not "necessarily" entail any determination whether the fruits of an allegedly unconstitutional arrest or search may be used in a state prosecution, much less whether a conviction is valid. *Id.* at 487, 488.

Thus, even if an arrest or other seizure leads to a statement or other evidence that is introduced in a section 1983 claimant's criminal trial and the claimant is convicted, "success on the merits" of a section 1983 challenge to the lawfulness of an arrest "would not '*necessarily* imply that the plaintiff's conviction was unlawful.'"[2] *See Nelson v. Campbell*, 541 U.S. 637, 647 (2004) (quoting *Heck*, 512 U.S. at 487 n. 7); *cf. Webster's Third New International Dictionary of the English Language, Unabridged* 1510 (Phillip Babcock Gove ed., 1976) (defining "necessarily" as "in such a way that it cannot be otherwise: of necessity: INEVITABLY, UNAVOIDABLY").

The court of appeals correctly recognized that *Heck* does not require either a case-by-case, individualized determination whether a particular arrest implies the invalidity of a conviction or any departure from the clear rule that an action for false arrest accrues at the time of arrest. Instead, *Heck* teaches that a section 1983 claim for damages arising out of

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[2] The question presented is: "When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?" This question addresses "the normal run of cases, in which the Fourth Amendment violation affects only the evidence that might or might not be presented to the trier of fact." Pet. App. 14. It does not raise, and this brief does not address, the narrow class of cases in which the asserted Fourth Amendment violation is "an element of the offense" of which a section 1983 claimant has been convicted. *See Heck*, 512 U.S. at 487 n. 6 (resisting arrest). In such circumstances, this Court has held that the section 1983 action "will not lie" unless and until the conviction is set aside. *Id.*

an arrest prohibited by the Fourth Amendment, which is filed within the applicable period of limitations from the time of arrest, "should be allowed to proceed, in the absence of some other bar to the suit." 512 U.S. at 487 (footnote omitted); *see also Edwards v. Balisok*, 520 U.S. 641, 649 (1997) ("[A]bsent some other bar to the suit, a claim [that] is cognizable under § 1983 . . . should immediately go forward . . . .").

A. Federal Law Provides that an Action for False Arrest Accrues at the Time of Arrest

Although federal law borrows state statutes of limitations and tolling principles, federal law governs directly the question of accrual of actions for constitutional torts under section 1983. *See Hardin v. Straub*, 490 U.S. 536, 538-44 (1989); *Wilson v. Garcia*, 471 U.S. 261, 266-71 (1985). Federal courts "generally apply a discovery accrual rule," which "start[s] the clock when a plaintiff knew or should have known of his injury." *Rotella v. Wood*, 528 U.S. 549, 553, 555 (2000). The cause of action accrues when the plaintiff knows of the injury, not when the full consequences of that injury are felt. *See, e.g., Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam); *see also* 1C Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 12.4, at 10 (3d ed. 1997) ("[T]he overwhelming number of § 1983 accrual decisions speak in terms of knowing or reason to know of injury, not that federal rights have been violated.").

Under the federal injury discovery accrual rule, a claim for damages arising out of false arrest accrues at the time of arrest, and, at least before this Court's decision in *Heck*, there was no dispute on this point. *See, e.g., Rose v. Bartle*, 871 F.2d 331, 350-53 (3d Cir. 1989) (action for false arrest accrues at time of arrest); *accord McCune v. City of Grand Rapids*, 842 F.2d 903, 906 (6th Cir. 1988); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983); *Singleton v.*

City of New York, 632 F.2d 185, 191 (2d Cir. 1980); *Rinehart v. Locke*, 454 F.2d 313, 315 (7th Cir. 1971). When a person's Fourth Amendment rights have been allegedly violated by an arrest without probable cause, the injury occurs at the time of the arrest, and "damages for that claim cover the time of detention up until issuance of process or arraignment, but not more." *Heck*, 512 U.S. at 484 (quoting W. Keeton et al., *Prosser & Keeton on Torts* 887-88 (5th ed. 1984)).

B. *Heck* Does Not Require Any Departure from the Clear and Settled Rule that an Action for False Arrest Accrues at the Time of Arrest

Congress has provided "two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983." *Muhammad*, 540 U.S. at 750. In policing the intersection of these avenues, the Court "has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement" either directly through an injunction or indirectly through a damages action. *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005).

There is, however, no need for any mechanism—delayed accrual or otherwise—to police the intersection of a section 1983 damages action for false arrest and habeas corpus because, put simply, there is no interference. Damages for false arrest do not go to the validity of a conviction and do not implicate any requirement "to resort to state litigation and federal habeas before § 1983."[3] *Muhammad*, 540 U.S. at

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[3] There is a second reason why damages for false arrest do not implicate any requirement to resort to habeas corpus. Federal habeas corpus does not lie for claims based on violations of the Fourth Amendment "where the State has provided an opportunity for full and fair litigation" of such claims. *Stone v. Powell*, 428 U.S. 465, 482 (1976). Because federal

752. Although a section 1983 damages action for false arrest does not interfere with federal habeas corpus and its "policy . . . that state courts be given the first opportunity to review constitutional claims bearing upon state prisoners' release from custody," *see Heck*, 512 U.S. at 488 n. 9, a section 1983 damages action for false arrest may raise, as *Heck* anticipated, other important federalism issues. *Heck* specifically stated that a section 1983 action "should be allowed to proceed" only "in the absence of some other bar to the suit" and carefully noted that concerns about comity, and in particular avoidance of parallel federal and state court proceedings, may require abstention. *Id.* at 487 & n. 8.

1. *A Successful False Arrest Action Does Not Necessarily Imply the Invalidity of a Conviction*

Because "[c]hallenges to the validity of any confinement or . . . its duration are the province of habeas corpus," *Muhammad*, 540 U.S. at 750, *Heck* carefully distinguished a section 1983 damages action that "would necessarily imply the invalidity of [a] conviction or sentence" from a damages action that "even if successful, would not *necessarily* imply that the . . . conviction was unlawful." 512 U.S. at 487 & n. 7. On the one hand, if a damages action would necessarily imply the invalidity of a conviction, the action "must be dismissed unless the [section 1983 claimant] can demonstrate that the conviction or sentence has already been invalidated."

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habeas corpus is not available for Fourth Amendment claims, a section 1983 action for damages for false arrest in violation of the Fourth Amendment cannot implicate any need to resort to this federal remedy. *See Muhammad*, 540 U.S. at 751, 755 (prisoner's section 1983 action "raised no claim on which habeas relief could have been granted" so "conditioning the right to bring a § 1983 action on a favorable result in state litigation or federal habeas [did not] serve[] the practical objective of preserving limitations on the availability of habeas remedies").

Id. at 487. On the other hand, a damages action that does not necessarily imply the invalidity of a conviction "should be allowed to proceed, in the absence of some other bar to the suit." *Id.* (footnote omitted).

Heck is best read as embracing a general rule that claims for damages arising out of a false arrest or other seizure prohibited by the Fourth Amendment do not necessarily imply the invalidity of a conviction. *See Gerstein v. Pugh,* 420 U.S. 103, 119 (1975) ("[T]he established rule [is] that illegal arrest or detention does not void a subsequent conviction."); *see also Haring v. Prosise*, 462 U.S. 306, 322 (1983) (Fourth Amendment claim [for illegal search] "is irrelevant to the constitutionality of . . . criminal conviction"). *Heck* specifically explained that Fourth Amendment damages claims for an illegal search do not necessarily imply the invalidity of a conviction and that such damages actions should be allowed to proceed in the absence of some other bar to the suit. *Heck* also addressed, and rejected, an argument that a section 1983 damages action should not be allowed to proceed if judgment in the section 1983 action would resolve a "necessary element," like probable cause, of "a likely challenge to a conviction." 512 U.S. at 488 (internal citation and quotation marks omitted).

Support for the foregoing reading of *Heck* is found first in *Heck's* discussion of "a suit for damages attributable to an allegedly unreasonable search." *Id.* at 487 n. 7. The Court identified such a suit as an example of a section 1983 damages action that "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment," and that "should be allowed to proceed, in the absence of some other bar to the suit." *Id.* at 487 (footnote omitted). The Court explained that "even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction," success on the merits of an unreasonable search claim "would not

necessarily imply that the plaintiff's conviction was unlawful" because of "doctrines like independent source and inevitable discovery, and especially harmless error." *Id.* at 487 n. 7 (citations omitted).

In a recent decision the Court explained that it was "careful in *Heck* to stress the importance of the term 'necessarily.'" *Nelson v. Campbell*, 541 U.S. 637, 647 (2004). It repeated and reaffirmed *Heck's* example of a section 1983 damages action for an illegal search that, even if successful, would not necessarily demonstrate invalidity of a criminal conviction and that "should be allowed to proceed, in the absence of some other bar to the suit":

> [W]e acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not "*necessarily* imply that the plaintiff's conviction was unlawful."

Id. at 647 (citing *Heck*, 512 U.S. at 487 n. 7).

The Court's focus on the importance of the term "necessarily" supports reading *Heck* as embracing a general rule that claims for damages arising out of a false arrest or other seizure prohibited by the Fourth Amendment do not imply the invalidity of a conviction.[4] A finding that there is

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[4] There would seem to be no reason that the rule—stated in *Heck* and repeated in *Nelson*—that damages for a *search* allegedly prohibited by the Fourth Amendment do not imply the invalidity of a conviction should not also include a suit for damages attributable to an *arrest* allegedly prohibited by the Fourth Amendment. A court in a civil action can decide that an individual was subjected either to an illegal search or to an illegal arrest without reaching the issue whether the evidence found or confession obtained should be excluded from the criminal trial and without making any additional determination about the effect of excluding evidence on the validity of a conviction. Indeed, because damages for false arrest as well as damages for illegal search do not include damages for conviction or

no probable cause for an arrest or for a search is logically incapable of necessarily demonstrating that a conviction is invalid. A finding of no probable cause may be a necessary—but not sufficient—element to support a determination that a conviction is invalid. The absence of probable cause, of course, is the starting point for arguments that the fruits of an arrest or search are tainted by the violation of the Fourth Amendment, that the tainted fruit is inadmissible, and that the tainted fruit would be critical to a conviction. A finding of no probable cause by itself, however, does not "necessarily" imply that a conviction is invalid because there must be other, intervening determinations such as "no attenuation," "no inevitable discovery," or "no harmless error." *See Heck*, 512 U.S. at 487 n. 7 (noting doctrines such as inevitable discovery, independent source, and harmless error).

Although the absence of probable cause may lead to a challenge to the validity of a conviction, and be an element of that challenge, *Heck* expressly rejected an argument that "[e]xhaustion of state remedies should be required . . . not just when success in the § 1983 damages suit would necessarily show a conviction or sentence to be unlawful, but whenever judgment in a § 1983 action would resolve a necessary element to a likely challenge to a conviction, even if the § 1983 court [need] not determine that the conviction is invalid." *Heck*, 512 U.S. at 488 (internal quotation marks omitted). Though probable cause for arrest may be a necessary element to a challenge to a conviction, the action "should be allowed to proceed" because a determination in a section 1983 damages action whether an arrest or other seizure is prohibited by the Fourth Amendment does not "necessarily" entail any determination whether the fruits of an

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incarceration, *see infra* at 15, a section 1983 court in an action for damages for false arrest or for illegal search has no occasion to consider whether the fruits of that arrest are tainted or whether there would have been a conviction absent admission of the fruits of an illegal arrest.

allegedly unconstitutional arrest or search may be used in a state prosecution, much less whether a conviction is valid. *Id.* at 487, 488.

2. *Federalism Issues Raised by a Section 1983 Damages Action for False Arrest are Addressed as a Matter of Comity and Not by Departures from Settled Rules of Accrual*

Although *Heck*, as the court below held, clearly supports a general rule that claims for damages arising out of a false arrest or other seizure prohibited by the Fourth Amendment do not necessarily imply the invalidity of a conviction, other courts have made case-by-case determinations about the relationship of false arrest claims to convictions. *See Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety Div. of State Police*, 411 F.3d 427, 448-49 (3d Cir. 2005) (Fuentes, J., pt. III.A. majority opinion) (noting the "two dominant approaches" to the question of whether accrual of Fourth Amendment claims is deferred under *Heck*, and "the general trend among the Courts of Appeals has been to employ the fact-based approach"), *cert. denied*, 126 S.Ct. 1571 (2006).

This creates an unworkable rule. If these courts conclude —on the basis of either a prediction about the possible course of a state criminal proceeding or a retrospective review thereof—that a particular false arrest claim would not or did not necessarily imply the invalidity of conviction, then that false arrest action accrues at arrest. If, however, the court concludes that a particular false arrest claim would or did necessarily imply the invalidity of a conviction, then that false arrest action accrues when conviction is invalidated.

Even if this case-by-case approach were a plausible reading of *Heck*, the consequence of this approach—delayed accrual of some false arrest actions—finds little support in that case. Delayed accrual, moreover, ignores *Heck's* prescription that the federalism issues raised by the direction that certain 1983

damage actions "proceed" should be resolved as a matter of comity. *See Heck*, 512 U.S. at 487 & n. 8; *Balisok*, 520 U.S. at 649. Most importantly, delayed accrual comes at a very high cost to fundamental policies underlying well-settled rules of accrual and statutes of limitations.

Delayed accrual of false arrest actions finds little support in *Heck*, which—far from marking any departure from traditional rules of accrual—simply applied the normal accrual rule for actions seeking damages for conviction and confinement: such actions accrue when the conviction is set aside. In *Heck*, the Court held that a section 1983 action for damages arising from conviction and confinement was analogous to the common-law action for malicious prosecution, which "permits damages for confinement imposed pursuant to legal process." 512 U.S. at 484. On the facts presented,[5] the Court adopted as the federal accrual rule the same rule that applies to an action for malicious prosecution:

> Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.

Heck, 512 U.S. at 489-90 (citations omitted).

There is, however, no analogy between an action under section 1983 for damages for conviction and confinement, at issue in *Heck*, and an action for damages for arrest without probable cause. An action for damages for arrest without probable cause is analogous to a common-law action for false

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[5] Heck alleged that prosecutors and a police investigator "had engaged in an 'unlawful unreasonable, and arbitrary investigation' leading to [his] arrest; 'knowingly destroyed' evidence 'which was exculpatory. . .'; and caused 'an illegal and unlawful voice identification procedure' to be used at [his] trial." 512 U.S. at 479.

arrest, and *Heck* expressly recognized that a false arrest action seeks damages not for conviction and confinement, but for "the time of detention up until issuance of process or arraignment, but not more."[6] *Id.* at 484 (internal quotation marks and citation omitted). Damages for false arrest can be awarded entirely apart from damages that might be available for conviction and confinement. *See id.* at 487 n. 7. False arrest damages for the period from arrest to first legal process can be awarded even if there is no criminal proceeding or no conviction and confinement.

Heck applied the normal accrual rule for actions seeking damages for conviction and confinement; it provides no warrant for changing the rule of accrual for other actions, like false arrest, that seek damages unrelated to conviction and confinement. Instead of altering accrual rules, *Heck* anticipated that federalism issues—raised by its direction that section 1983 damages actions that do not necessarily imply the invalidity of a conviction "should be allowed to proceed in the absence of some other bar to the suit," 512 U.S. at 487 (footnote omitted)—would be addressed as a matter of comity.

The federalism issue raised by a section 1983 damages action that does not imply the invalidity of a conviction, like a false arrest claim, is not interference with federal habeas corpus and exhaustion of state remedies. *Heck* makes clear that a false arrest damages action does not implicate any requirement "to resort to state litigation and federal habeas before § 1983" because it "threatens no consequence for [a prisoner's] conviction or the duration of his sentence." *Muhammad*, 540 U.S. at 751. The federalism issue posed by

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[6] Confining damages for a false arrest cause of action to this period does not leave a section 1983 plaintiff without adequate remedies for post-arraignment constitutional violations. *See Heck*, 512 U.S. at 484 (damages available to "a successful malicious prosecution plaintiff").

Heck's directive that the section 1983 action "should be allowed to proceed" is the possibility of parallel federal civil and state criminal or civil proceedings.

Heck cautions generally that section 1983 actions—such as actions for illegal search and false arrest—that do not imply the invalidity of a conviction "should be allowed to proceed" only "in the absence of some other bar to the suit." 512 U.S at 487 & n. 8. It points specifically to abstention as the answer to the potential problems of parallel federal and state court proceedings:[7] "if a state criminal defendant brings a

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[7] In addition to the possibility of parallel federal and state court proceedings, which are to be addressed as a matter of comity, section 1983 false arrest damages actions may raise concerns about avoiding different outcomes in federal and state proceedings and avoiding collateral attacks on criminal convictions through a civil suit. *See Heck*, 512 U.S. at 484 (noting that accrual of malicious prosecution action after conviction is set aside (1) "avoids parallel litigation," (2) "precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction," and (3) avoids a "collateral attack on the conviction through the vehicle of a civil suit").

A section 1983 false arrest action is not a collateral attack on a conviction because damages for an arrest made without probable cause do not "necessarily" imply the invalidity of a conviction. *See supra* at 9-13. *Heck* contemplated a risk of some inconsistency between findings on issues like probable cause because it declined to adopt a "broader" rule that "[e]xhaustion of state remedies should be required . . . not just when success in the § 1983 damages suit would necessarily show a conviction or sentence to be unlawful, but whenever 'judgment in a § 1983 action would resolve a necessary element to a likely challenge to a conviction, even if the § 1983 court [need] not determine that the conviction is invalid." 512 U.S. at 488. *Heck* also contemplated that if a section 1983 court did not abstain and a civil rights action proceeded before state proceedings were complete, any inconsistency in findings, on issues like probable cause, as opposed to inconsistent outcomes or resolutions, would be permissible given "court-made preclusion rules." *Id.* at 487 n. 9 (preclusion rules can "take account of the policy embodied [in the

federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings." 512 U.S. at 487 n. 8. The criteria for abstention in the face of pending state trial, state appeal, or state post-conviction proceedings are beyond scope of the question presented. Two points, nonetheless, are worth noting. First, abstention criteria will be an issue regardless of whether *Heck* is read as embracing a general rule that false arrest actions "proceed" because they do not necessarily imply the invalidity of a conviction or as countenancing a case-by-case approach under which some, but not all, false arrest damages actions "proceed." Second, abstention may well take into account the differences (and possible conflict) between discovery in a section 1983 civil action and discovery in a criminal proceeding. *See Degen v. United States*, 517 U.S. 820, 825-26 (1996) (discussing difficulties in discovery created by concurrent civil and criminal litigation). Delayed accrual thus serves no purpose that is not better served by a clear rule that a false arrest action accrues at arrest and that a section 1983 false arrest damages action "shall proceed" unless comity requires abstention.

II. A BRIGHT-LINE RULE THAT A CLAIM FOR DAMAGES FOR FALSE ARREST ACCRUES AT THE TIME OF ARREST ENSURES PREDICTABILITY AND AVOIDS TIME-CONSUMING LITIGATION

A clear rule that a claim for damages for false arrest accrues at the time of the arrest is far preferable to a variable

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exhaustion requirements of the habeas corpus statute] that state courts be given the first opportunity to review constitutional claims bearing upon state prisoners' release from custody"). To the extent that other circumstances might present some risk of inconsistent findings, they are also appropriately addressed under abstention and preclusion principles.

rule of accrual, which is the product of case-by-case determination whether a particular arrest implies the invalidity of a conviction. Such case-by-case determinations and delayed accrual of some but not all claims are "at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S at 555. Case-by-case determination of accrual of false arrest actions, like case-by-case "analysis of the particular facts of each claim" to select a statute of limitations, "inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983." *Wilson v. Garcia*, 471 U.S. at 272.

A. A Clear Rule of Accrual Relieves Federal Courts From Making Case-by-Case Predictions About the Relationship of Arrests to Convictions

In the absence of a clear rule that a damages action for false arrest does not imply the invalidity of a conviction, some courts have undertaken a case-by-case consideration of the relationship of false arrest claims to a possible conviction. Under this approach, a false arrest damages action does not accrue until the conviction is set aside if a court makes an individualized determination that a finding of no probable cause for arrest would necessarily imply the invalidity of a conviction. *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) ("[o]n these facts" a finding of no probable cause would imply the invalidity of the conviction, so the "false arrest and imprisonment claims were not cognizable and did not accrue" until the conviction was invalidated). Conversely, a false arrest damages action accrues at the time of the arrest if there is a case-specific determination that a finding of no probable cause for arrest would not necessarily imply the invalidity of a conviction. *See Gibson*, 411 F.3d at 449-50 (*Heck* "requires a fact-based

inquiry" and "in some cases Fourth Amendment claims for false arrest begin to accrue at the time of arrest").

Faced with this uncertainty, a prudent lawyer or pro se plaintiff will file a section 1983 damages action for false arrest within the limitations period after the time of the arrest. Then, depending on the progress of state criminal proceedings at the time of the filing, the court in which the section 1983 action is filed will be forced to make either a prediction or a retrospective determination about the relation of an arrest to a conviction—a determination that would be entirely unnecessary under a general rule that false arrest damages actions do not imply the invalidity of a conviction and that such actions "should be allowed to proceed in the absence of some other bar to the suit." *Heck*, 512 U.S. at 487.

A prudent lawyer will not run the risk of filing a section 1983 false arrest damages action after a conviction is set aside and will, instead, file the action within the limitations period after an arrest. To do otherwise would risk that the court will decide that false arrest damages do not imply the invalidity of a conviction. In that event, the false arrest action will have accrued at the time of arrest. If the limitations period for a false arrest claim has run before the conviction is set aside, the lawyer may have resort to some variant of equitable tolling, although equitable tolling is "the exception, not the rule." *Rotella*, 428 U.S. at 561.

To avoid this risk, lawyers will take the much safer course of filing a section 1983 damages action within the period of limitations after the arrest. A court will then have to make a prediction whether false arrest damages imply the invalidity of a conviction. If the court predicts that false arrest damages imply the invalidity of the conviction, the false arrest action will accrue when the conviction was set aside, and the section 1983 action will be dismissed, presumably without prejudice. If, on the other hand, the court predicts that damages for false arrest do not imply the invalidity of a conviction, then the

false arrest action will have accrued at the time of arrest, and the 1983 action will proceed "in the absence of some other bar to the suit." *Heck*, 512 U.S. at 487.

A judicial prediction whether a section 1983 damages action for false arrest would, or would not, imply the invalidity of a conviction is, as the court below recognized, an uncertain and difficult matter. Pet. App. 12 ("*ex ante* it is not readily apparent which criminal cases might proceed despite the consequences of the successful Fourth Amendment challenge"). The section 1983 court must predict the outcome of a state criminal prosecution. It must predict first whether there is probable cause, and then, assuming that it predicts that an arrest or search is invalid because there was no probable cause, it must predict whether success on the false arrest action would necessarily imply the invalidity of the conviction. This second level of prediction will require a judicial determination whether a statement or other evidence is inadmissible as the tainted fruit of illegal arrest or search or whether it is otherwise admissible under such doctrines as independent source, inevitable discovery, and harmless error. *See Heck*, 512 U.S. 487 n. 7.

A prediction whether the fruits of an arrest or search are admissible because they are sufficiently attenuated from unconstitutional conduct is difficult because it "must be answered on the facts of each case." *Brown v. Illinois*, 422 U.S. 590, 603 (1975); *see* J.A. 27-34 (Illinois Appellate Court's determination under *Brown* that Wallace's statement was not sufficiently attenuated from his illegal arrest to be admissible). The difficulties of the predictions that a section 1983 court must make under the case-by-case approach are suggested by consideration of just one of the doctrines—harmless error—that may support a determination that a particular arrest does not imply the invalidity of a conviction.

With respect to the harmless error doctrine, one prominent commentator has observed that, under the case-by-case

approach, a determination whether a particular arrest would imply the invalidity of a conviction may "turn on a rather delicate analysis of the harmless error rule or some variant of it . . . ." Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1450 (5th ed. 2003). This observation is well-taken. A prediction whether it is harmless error to admit a statement or other evidence, which is the fruit of an arrest or search made without probable cause, is difficult because it is fact-intensive. *See United States v. Lane*, 474 U.S. 438, 448 (1986) ("In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations.") (quoting *Kotteakos v. United States*, 328 U.S. 750, 762 (1946); 3B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 854, at 461-62 (3d ed. 2004) (in determining harmless error courts necessarily must look to the circumstances of the particular case and decisions in other cases are only of limited value). A clear rule that false arrest actions accrue at arrest relieves federal courts of the burdens of making fact-specific preliminary determinations about the relationship of an arrest to a conviction.

B. Delayed Accrual of False Arrest Actions Conflicts with the Fundamental Purposes of Statutes of Limitations

In addition to unnecessary litigation over accrual issues, a determination under the case-by-case approach that a false arrest action accrues only after a conviction is set aside "would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability." *Rotella*, 528 U.S. at 559. Statutes of limitations provide repose, foster accurate fact-finding, and promote judicial efficiency. Decisions that delay or extend accrual interfere with legislative judgments about the proper balance of these

interests and enforcement of substantive policies, and they cause significant problems "on a human level." *Wilson*, 471 U.S. at 275 n. 34 ("On a human level, uncertainty about [limitations periods] is costly to all parties.").

Statutes of limitations are "statutes of repose," which "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (internal quotation marks omitted). Statutes of limitations, however, are not only provisions "assur[ing] potential defendants that after the expiration of a given period they will not be subject to defend against judicially asserted claims." 1 Calvin W. Corman, *Limitation of Actions* § 1.1, at 8 (1991).

Statutes of limitations also promote the search for the truth: "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson*, 471 U.S. at 271; *see also Board of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980) (statutes of limitations promote "the accuracy of the fact-finding process"). Moreover, statutes of limitations promote judicial efficiency. *See, e.g.*, Corman, § 1.1, at 16 ("Judicial efficiency is the reward when these statutes produce speedy and fair adjudication of the rights of the parties" and promote "[c]ertainty and finality in the administration of affairs").

At bottom, statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Kubrick*, 444 U.S. at 117 (internal citation and quotation marks omitted), reflect a careful legislative balancing of important interests:

> [A]lthough affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal

> with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

Id. Thus, in borrowing state statutes of limitations for personal injury as the rule for section 1983 civil rights actions, this Court observed that "federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson*, 471 U.S. at 271.

Because a statute of limitations does not begin to run until an action accrues, a rule that would delay accrual beyond injury discovery interferes with judgments about the proper balance of repose, accuracy of fact finding, judicial efficiency, and enforcement of substantive policies. In *Rotella*, for example, the Court recognized that delayed accrual would interfere with policies underlying a four-year statute of limitations that it had previously adopted for RICO actions. 528 U.S. at 553. It compared "an injury discovery accrual rule starting the clock when a plaintiff knew or should have known of his injury" with "an injury and pattern discovery rule . . . under which a civil RICO claim accrues only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity." *Id.*

The Court rejected the injury and pattern discovery rule, a departure from the traditional federal accrual rule of injury discovery, because the delay in accrual and consequent extension of the period of limitations was "at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 555; *see also id.* at 554 (noting that the Court had previously rejected another extended rule of accrual in RICO actions because "[p]reserving a right of action for . . . a vast stretch

of time would have thwarted the basic objective of repose underlying the very notion of a limitations period") (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997)).

Accrual of a section 1983 action is a matter of federal law, and application of the rule that a false arrest action accrues at the time of the arrest—the traditional federal injury discovery accrual rule—is consistent with respect for legislative judgments about "the proper balance between the policies of repose and the substantive policies of enforcement." *Wilson*, 471 U.S. at 271. The case-by-case approach – delayed accrual of some false arrest actions until a conviction is set aside—upsets this balance.

The problems created by delayed accrual are more than systemic. The Court has recognized that "[o]n a human level, uncertainty [about the limitations period] is costly to all parties." *Id.* at 275 n. 34. As the Court explained:

> Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.

Id. Just as uncertainty about the limitations period causes problems on the human level, so does uncertainty about accrual because a limitations period does not begin to run until the action accrues.

This case—with the passage of more than nine years from Wallace's arrest to the filing of his section 1983 action—illustrates the problems of delayed accrual for defendants. Police officers make many arrests during one year and an untold number in the course of their careers. *See* U.S. Dept. of Justice Federal Bureau of Investigation, *Crime in the United States 2005* tbl. 29, *available at* http://www.fbi.gov/ucr/05cius/index.html (for 29 offenses for which data is collected, there were an estimated 14,094,186 arrests in the

United States in 2005). Absent accrual of an action for false arrest at the time of arrest, police officers will not have timely notice or an opportunity to preserve evidence for a defense, and the governmental entities that employ police officers will not be able to calculate their contingent liabilities for indemnification and other costs of a judgment against the officer.

The passage of nine years will obviously make it difficult for officers to "defend against claims for which necessary evidence may no longer be available, memories may have faded, or important witnesses may have disappeared." Corman, § 1.1, at 11-12. The rule that a false arrest action accrues at the time of the arrest "protect[s] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. at 117. It also "afford[s] plaintiffs . . . a reasonable time to present their claims," *id.*, which in all but four states and Puerto Rico is at least two years.[8]

As this case illustrates, civil rights plaintiffs should be able to file section 1983 actions within two years of arrest, or earlier if required by the applicable statute of limitations. Wallace filed a motion to quash his arrest and suppress

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[8] According to one comprehensive listing, the statute of limitations in section 1983 actions in Illinois, 21 other States, and Guam is two years. The statute of limitations is one year in four States and Puerto Rico. Fourteen States and the District of Columbia have three-year periods of limitations; four States have a four-year statute of limitations; one State has a five-year period of limitations; and three States and the Virgin Islands have a six-year period of limitations. 1C Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 12.9, at 45-57 (3d ed. 1997 & Supp. 2003-1 § 12.9, at 685-88). Although the statutes of limitations applied in two States, New Hampshire and South Carolina, are not included in this compilation, the limitations period for personal injury actions in these States is three years. *See* N.H. Rev. Stat. § 508:4; S.C. Code 1976 § 15-3-535.

evidence on August 18, 1994, just one day short of seven months after he was arrested. Supp. App. 57.[9] Although the motion to quash contained few details, it did allege a lack of probable cause. *Id.* at 58. Moreover, the hearings on this motion, which were held between April 26, 1995 and January 18, 1996, show that Wallace had sufficient information to file his section 1983 false arrest action well within two years of his arrest. *See* J.A. 7-11 (Op. of Ill. App. Ct.). In short, when Wallace initiated his section 1983 action more than nine years after his arrest, his complaint, Supp. App. 1, and amended complaint, Supp. App. 16, advanced claims that he could have asserted well prior to the expiration of the limitations period.

C. Accrual of False Arrest Actions at the Time of Arrest Avoids Uncertainty and Time-Consuming Litigation That is Foreign to the Central Purposes of Section 1983

The Court has frequently recognized the importance of jurisdictional tests that are clear, easily applied, and lead to predictable results. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995); *see also* Charles Alan Wright, *The Federal Courts – a Century After Appomattox*, 52 A.B.A. J. 742, 745 (1966) (jurisdictional line between federal and state courts "should be bright and clear, so that judicial time is not wasted on cases brought in the wrong court"); *cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 345-54 (2001) (Fourth Amendment is not well served by case-by-case determinations and there is an "essential interest in readily administrable rules").

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[9] References to "Supp. App." are to the Supplemental Appendix of Plaintiff-Appellant Andre Wallace filed in the court of appeals (7th Cir. No. 04-3949).

Clarity and certainty are equally important in other matters—like accrual—that go to the initiation of an action. A clear rule that false arrest actions accrue at the time of arrest avoids the uncertainty of case-by-case predictions whether a particular arrest was made without probable cause and whether it would imply the invalidity of a conviction. Such a clear rule also avoids uncertainty that would interfere with "an effective remedy for the enforcement of federal civil rights" under section 1983, *Wilson*, 471 U.S. at 275, and spares federal courts time-consuming and fact-intensive litigation over accrual issues.

For these reasons, in determining the statute of limitations for section 1983 actions, the Court has rejected a fact-specific approach:

> The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983.

Id. at 272. A clear, bright-line rule that a section 1983 damages action for false arrest accrues at arrest is "consistent with the assumption that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation." *Id.* at 275; *see Owens v. Okure*, 488 U.S. 235, 247 (1989) ("[O]ur task today is to provide courts with a rule for determining the appropriate personal injury limitations statute that can be applied with ease and predictability in all 50 States.").

Statutes of limitations begin to run from the accrual of the cause of action, and if the day of accrual is unclear, the period of time within which the action must be filed is equally unclear. Just as the Court has rejected a fact-specific ap-

proach to the statute of limitations for section 1983 actions, it should reject a fact-specific approach to determining when these actions accrue.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

ANDRE WALLACE, PETITIONER,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO AND EUGENE ROY, RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, DELAWARE, IOWA, MONTANA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, UTAH, WASHINGTON AND WISCONSIN, AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?

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INTEREST OF THE *AMICI CURIAE*

This case presents the question whether a civil damages claim arising from an alleged Fourth Amendment violation accrues (i) when the challenged search or seizure occurs, as the Seventh Circuit held and respondent City of Chicago urges, or (ii) on a date that depends upon the particular facts of each case, as petitioner Andre Wallace maintains.

Amici States have a strong interest in the resolution of this question. Although this case involves a municipality, state employees and officers frequently are named as defendants in suits brought under 42 U.S.C. § 1983 alleging Fourth Amendment violations. See, *e.g.*, *Green v. Butler*, 420 F.3d 689 (7th Cir. 2005); *Russell v. Harms*, 397 F.3d 458 (7th Cir. 2005). The Seventh Circuit's bright-line rule, aside from protecting the States from additional rounds of litigation in § 1983 suits, provides certainty and predictability, which benefits civil plaintiffs and state defendants alike. Starting the limitations clock with the challenged search or seizure, moreover, promotes the important state interest in seasonal notice of alleged wrongdoing by state actors, and permits the States to preserve evidence relevant to future civil claims.

STATEMENT

The history of this case well illustrates the advantages of the Seventh Circuit's bright-line rule and the uncertainty and potential for abuse inherent in petitioner's alternative.

1. John Handy was shot and killed on January 17, 1994. Chicago police officers investigating the murder brought petitioner Andre Wallace to the police station for questioning two days later. Early the next morning, after confronting Wallace with statements by witnesses who claimed they saw him running from the crime scene after hearing gun shots, Wallace confessed. Pet. App. 2-3.

2. Prior to trial, Wallace moved to suppress his confession on two grounds, claiming that officers (i) arrested him without probable cause and (ii) obtained his confession unlawfully. The trial court denied the motions and, following a bench trial, found Wallace guilty of first degree murder. Pet. App. 3-4.

Wallace appealed, and on September 21, 1998, the Appellate Court of Illinois held that he had been unlawfully arrested and remanded for a hearing on whether his confession was sufficiently attenuated from the unlawful arrest to be admissible. J.A. 6-23. On remand, the trial court held that there was sufficient attenuation and therefore that the confession was admissible. Wallace again appealed, and the appellate court reversed, ruling that his confession should have been suppressed and remanding for a new trial. J.A. 24-35. The State declined to reprosecute, and filed a *nolle prosequi* motion on April 10, 2002. Pet. App. 4.

3. On April 2, 2003, Wallace filed this federal lawsuit under 42 U.S.C. § 1983 against the City of Chicago and two Chicago police officers, respondents Kristen Kato and Eugene Roy, seeking damages for, among other things, alleged violations of his Fourth Amendment rights. Pet. App. 4. In two separate opinions, the district court held that Wallace's claims were time-barred. Pet. App. 30-52.

With respect to the Fourth Amendment claims, Wallace relied upon the Seventh Circuit's then-recent decision in *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003). Pet. App. 50. Based upon its reading of *Heck v. Humphrey*, 512 U.S. 477 (1994), *Gauger* held "that when a constitutional claim under Section 1983 for false arrest would, if vindicated, undermine a state conviction, the statute of limitations is not tolled until the charges against the defendant are dropped." Pet. App. 50-51 (citing *Gauger*, 349 F.3d at 360-361). The district court concluded *Gauger* did not help Wallace because, even if his

Fourth Amendment claims did not accrue at the time of his arrest, they accrued no later than September 21, 1998—more than four years before he filed his § 1983 suit—when the state appellate court held his arrest unlawful but remanded for a finding on attenuation, implying that Wallace's false arrest claim did not necessarily undermine his conviction. Pet. App. 51-52.

4. The Seventh Circuit affirmed. Noting that *Heck* "held that a constitutional claim [for damages] that would undermine a criminal conviction if vindicated cannot be brought until the defendant's conviction is nullified," the court observed that the circuits had divided over whether a false arrest claim could ever be said to undermine a conviction within the meaning of *Heck*. Pet. App. 8, 15. The Seventh Circuit concluded, disapproving its prior decision in *Gauger*, that because a successful civil claim for false arrest does not necessarily undermine a civil plaintiff's underlying conviction the best course was to impose a bright-line rule that false arrest claims accrue when the challenged seizure occurs, not if and when the resulting conviction is overturned. Pet. App. 12-13.

According to the Seventh Circuit, *Heck* made clear that Fourth Amendment claims for "an unlawful search or arrest may be brought immediately, because a violation of the [F]ourth [A]mendment does not necessarily impugn the validity of a conviction." Pet. App. 9 (internal quotations omitted). And the court found that Wallace's case-by-case approach would be impractical because it would require federal § 1983 courts to predict whether, on the facts of a particular case, a successful Fourth Amendment challenge would necessarily invalidate the claimant's conviction:

> *ex ante* it is not readily apparent which criminal cases might proceed despite the consequences of the successful Fourth Amendment challenge. This, in our

> view, argues against a rule that requires judges several years after the event to decide whether a particular Fourth Amendment challenge would have been the death knell of the prosecution.

Pet. App. 12.

5. Wallace filed a certiorari petition seeking review of two questions: (i) when does a claim for damages under the Fourth Amendment or for an allegedly coerced confession under the Fifth Amendment accrue where the civil plaintiff has been convicted using the fruits of the alleged misconduct; and (ii) are damages available under § 1983 for an allegedly "unlawful seizure that began at the time of arrest and continued to the time that charges were dismissed." Pet. i. The Court granted the petition, limited to the first question, reformulated as follows: "When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?"

SUMMARY OF ARGUMENT

Heck v. Humphrey, 512 U.S. 477 (1994), prevents civil plaintiffs from using § 1983 suits to challenge their criminal convictions collaterally, without satisfying the exhaustion and other requirements for federal habeas relief. *Heck* does so by requiring civil plaintiffs, as an element of their civil causes of action, to prove that their underlying criminal proceedings terminated in their favor. The Court was careful to limit this "favorable termination" requirement to circumstances where success in the plaintiff's civil suit would "necessarily imply" the invalidity of any criminal conviction. *Id.* at 487.

The Seventh Circuit correctly applied *Heck* in holding that a § 1983 claim for false arrest or other unlawful search or seizure accrues precisely when the challenged search or seizure

occurs. The rule in *Heck* postpones accrual of a § 1983 claim only if the plaintiff's success on that claim cannot coexist with a valid criminal conviction or sentence. This rule is derived from the common law of tort, which makes the plaintiff's success in his underlying criminal action an element of a malicious prosecution claim (like the one advanced in *Heck*), but not of Fourth Amendment tort analogues like false arrest and trespass. *Heck* and its progeny foreclose Wallace's case-by-case approach to claim accrual, under which the accrual date depends not on the claim's formal legal elements and compatibility with a valid conviction and sentence, but on the particular facts of the underlying criminal case and a determination whether civil claims could coexist with a lawful conviction on those specific facts.

Wallace's approach not only is unsound doctrinally, but also runs counter to *Heck*'s express purpose and produces untenable practical consequences. *Heck* aimed to protect habeas as the sole federal vehicle for attacking a state conviction or sentence. But a state criminal court's decision to admit evidence procured in violation of the Fourth Amendment is not grounds for federal habeas relief, see *Stone v. Powell*, 428 U.S. 465 (1976), so with respect to Fourth Amendment claims there is no federal habeas vehicle to protect. Ironically, Wallace reads *Heck* to *require* federal § 1983 courts to decide issues that state courts have yet to decide, merely to determine whether *Heck*'s "favorable termination" requirement even applies. Moreover, resolving the intensely fact-specific issues that would face district courts at the outset of § 1983 cases would make it nearly impossible for defendants to prevail on a statute of limitations defense in many (if not most) such cases on motions to dismiss or for summary judgment.

Beyond this, there is a basic unfairness in Wallace's proposal. Governments have a powerful interest in timely notice of alleged misconduct by their agents, either to discipline

offenders within their ranks or to preserve evidence needed to defend the wrongly accused. Wallace's approach, which would postpone the filing of some § 1983 claims until many years after the alleged misconduct, runs directly counter to this interest. At the same time, civil plaintiffs would run the risk that their counsel would forfeit legitimate claims by erroneously predicting that the § 1983 court, at some point in the future, would select a later accrual date.

Amici States respectfully submit that the Seventh Circuit correctly concluded that it would be most consistent with the letter and spirit of *Heck* to hold that claims for damages for alleged Fourth Amendment violations accrue at the time of the challenged search or seizure.

ARGUMENT

Wallace's challenge to the Seventh Circuit's categorical, bright-line rule fails on multiple grounds. The alternative he urges—under which claim accrual depends upon the particular facts of each case—cannot be squared with *Heck v. Humphrey*, 512 U.S. 477 (1994). By contrast, the Seventh Circuit's rule reflects *Heck*'s concern with intrinsic, doctrinal incompatibilities between successful civil claims and outstanding criminal convictions, and comports with *Heck*'s interest in preserving the ability of state courts to resolve challenges to state criminal proceedings in the first instance. In addition, Wallace's approach would have untoward consequences. Unlike the Seventh Circuit's clear and predictable rule, Wallace's alternative would delay the filing of suits alleging official misconduct and would likely trip up plaintiffs' counsel trying in good faith to file timely complaints. The case-by-case approach also would require an additional layer of fact-intensive litigation in many § 1983 suits.

I. Wallace's Case-By-Case Approach Cannot Be Squared With The Rule Of *Heck* Or Its Rationale.

This case turns in large part on the proper understanding of *Heck*. *Heck* made clear that its "favorable termination" rule—requiring § 1983 plaintiffs to prove that their criminal proceedings ultimately terminated in their favor as an element of their civil claims—does not apply merely when there is some overlap between the civil and criminal cases. Rather, the rule applies only where there is an actual inconsistency between a successful civil claim and a valid conviction. Wallace's alternative ignores this requirement and cannot be reconciled with *Heck*'s underlying objectives.

A. The Rule In *Heck* Turns On Whether A Successful Claim For Damages Can Coexist Doctrinally With A Lawful Criminal Conviction.

Roy Heck's § 1983 suit effectively challenged the "legality of his [state court] conviction" for voluntary manslaughter. *Heck*, 512 U.S. at 478-480. Had Heck sought directly to overturn his actual conviction or sentence, his suit would have fallen squarely within the prohibition of *Preiser v. Rodriquez*, 411 U.S. 475 (1973), and his only federal remedy would have been habeas relief. *Heck*, 512 U.S. at 481; see also *Hill v. McDonough*, 126 S. Ct. 2096, 2101 (2006); *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). But Heck sought only damages. The problem was that he sought damages on a theory that, if vindicated, would necessarily have meant that his conviction was unlawful. *Heck*, 512 U.S. at 480.

This Court concluded that in suits like Heck's—where victory for the plaintiff "would necessarily imply the invalidity of his conviction or sentence"—the civil "complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has been invalidated." *Id.* at 487. In reaching its conclusion, the Court "look[ed] first to the common

law of torts," specifically at "[t]he common-law cause of action for malicious prosecution." *Id.* at 484. Malicious prosecution "provide[d] the closest analogy" to Heck's constitutional challenge because, like Heck's claim, it "permits damages for confinement imposed pursuant to legal process." *Ibid.* And among the elements "that must be alleged and proved in a malicious prosecution action is termination in the prior criminal proceeding in favor of the accused." *Ibid.*; see also *Wilson v. Garcia*, 471 U.S. 261, 277 (1985) ("we have found tort analogies compelling in establishing the elements of a cause of action under § 1983"). The common law required proof of this element to avoid "parallel [civil and criminal] litigation," and this Court found the same policy implicated by civil claims, like Heck's, "that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S. at 485.

The Court held that *Heck*'s "favorable termination" requirement would apply not only to suits for "damages for allegedly unconstitutional conviction or imprisonment," but also to claims "for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." *Id.* at 486. The lone example the Court provided of such an "other harm" was a Fourth Amendment false arrest suit where the underlying conviction was for resisting arrest, an offense that has as one of its elements the legality of the arrest. *Id.* at 487 n.6. For a civil plaintiff to prevail in such a case, "he would have to negate an element of the offense of which he has been convicted." *Ibid.* Thus, it would be impossible for both the plaintiff in the civil case and the prosecution in the criminal case to prevail without violating the "strong judicial policy against the creation of two conflicting resolutions" of the same issue. *Id.* at 484 (internal quotations omitted). *Heck* advances that judicial policy by "specif[ying] that a prisoner cannot use § 1983 to obtain damages where success *would necessarily* imply the unlawfulness of a (not previously invalidated)

conviction or sentence." *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (emphasis in original).

By it very nature, a Fourth Amendment § 1983 claim does not share elements with a criminal offense (with the exception of the crime of resisting arrest). Accordingly, a successful damages suit for an unlawful search or seizure does not "require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S. at 485. This proposition led this Court to expressly distinguish claims like Heck's, which resemble common law claims for malicious prosecution, from Fourth Amendment claims. The Court noted that the common law treats malicious prosecution and false arrest claims very differently, compensating victims of the former for any resulting conviction and incarceration, but limiting the latter to harm caused by the arrest itself, without regard to any ensuing prosecution. See *id.* at 484 (while "a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society," damages for the tort of false arrest only "cover the time of detention up until issuance of process or arraignment, but not more") (internal quotations omitted). And the Court explained that claims for unlawful searches, unlike Heck's claim, are not intrinsically inconsistent with a valid conviction:

> [A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

Id. at 487 n.7.

Wallace's case hinges on the fact that footnote seven did not go even further and say that *every* Fourth Amendment claim falls outside of *Heck*'s "favorable termination" rule. But, as the Seventh Circuit observed, the facts in *Heck* did not require the Court to make such a categorical statement. Pet. App. 12 ("Although the Court refrained from holding that all Fourth Amendment claims accrue immediately, it had no need to reach that issue in *Heck*."). The crux of the footnote is that any effort to undo a conviction on Fourth Amendment grounds will require more than the bare showing that police made an unlawful search or seizure. Several doctrines will insulate convictions from reversal—the independent source doctrine, the inevitable discovery rule, the harmless error doctrine, or attenuation between a confession and a false arrest. Consequently, any effort to recover damages for an unlawful search or seizure will not "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S. at 485. As the Court recently explained, "we acknowledged [in *Heck*] that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not '*necessarily* imply that the plaintiff's conviction was unlawful.'" *Nelson*, 541 U.S. at 647 (quoting *Heck*, 512 U.S. at 487 n.7) (emphasis in original).

The disconnect between a Fourth Amendment violation and a wrongful conviction deepened even further last Term as a result of *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), where this Court held that exclusion is not the remedy for every Fourth Amendment violation, even where that evidence "would not have come to light but for the illegal actions of the police." *Id.* at 2164 (internal quotations omitted). Evidence obtained illegally may still be admissible, so long as "the interest

protected by the constitutional guarantee that has been violated would not be served by suppression" or exclusion's "deterrence benefits outweigh its substantial social costs." *Id.* at 2164, 2165 (internal quotations omitted). This further uncoupled Fourth Amendment claims from the validity of the conviction. And *Hudson* emphasized that § 1983 actions may be brought to seek recompense for Fourth Amendment violations even where the violation did not result in the exclusion of evidence at trial. *Id.* at 2166-2168.

In short, *Heck* limits its "favorable termination" requirement to civil claims that, by definition, cannot succeed without necessarily undermining a criminal conviction and sentence. With the narrow exception identified in *Heck* for the crime of resisting arrest, Fourth Amendment claims do not meet this standard.

B. Wallace's Damages Theory Does Not Affect The Accrual Date.

In urging that his Fourth Amendment claim did not accrue until his release from prison, Wallace relies heavily on the fact that he seeks damages for his incarceration. He emphasizes that his imprisonment "was the natural consequence of respondents' actions" (Pet. Br. 8), that his claim is "for the injury of being convicted and imprisoned" (*id.* 10), that the Seventh Circuit erred by failing to recognize the availability of damages for his conviction and incarceration (*id.* 13-14), and that he did not have a cause of action for these damages until the Illinois courts overturned his conviction (*id.* 30). Given these premises, Wallace contends that his claim did not accrue until his release because he sought compensation for the entire period of his incarceration.

The Seventh Circuit held, correctly, that Wallace is not entitled to use a Fourth Amendment challenge to seek damages for his time in prison. Pet. App. 7 ("When a person's Fourth

Amendment rights have been violated by a false arrest, the injury occurs at the time of the arrest. Thus, an individual is entitled to recover only for injuries suffered from the time of arrest until his arraignment."). And more to the point, the Court did not grant Wallace's petition for certiorari on this issue. See page 4, *supra*; Sup. Ct. R. 24.1(a) (petitioner's brief "may not raise additional questions"). In any event, Wallace's attempt to use his damages theory to defer the accrual of his claims promotes gamesmanship, misreads *Heck*, and confuses claim accrual with tolling.

First, relying on the plaintiff's damages theory to determine the accrual date of a claim would promote gamesmanship and artful pleading. By alleging injury from the illegal search or seizure itself, a § 1983 plaintiff could avoid *Heck* and advance a claim regardless of the status of his criminal case. Conversely, a plaintiff who succeeds in overturning his conviction years after the challenged search or seizure (and who might have filed a Fourth Amendment claim earlier but did not) could avoid the time bar by alleging damages for the period of his incarceration, as Wallace did here. Such a regime would be unprincipled and ad hoc, tying the accrual date to the nature of the injury alleged by each individual plaintiff.

Second, Wallace's argument misreads *Heck*. Wallace focuses on the last sentence of footnote seven, which states that "the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury . . . *which . . . does not encompass the 'injury' of being convicted and imprisoned (until his conviction has been overturned).*" 512 U.S. at 487 n.7 (emphasis added); see Pet. Br. 30. But this passage does not leave it to the plaintiff to decide whether to avoid the "favorable termination" requirement and seek immediate accrual (by alleging damages only for the search or seizure) or to defer accrual (by alleging damages for his conviction and incarceration). The passage merely bars a

plaintiff from seeking damages arising from his conviction or incarceration unless and until he first mounts a successful challenge to that conviction or incarceration. See, *e.g.*, *Braxton v. Scott*, 905 F. Supp. 455, 458-459 (N.D. Ohio 1995) (sustaining illegal arrest claim because plaintiff "allege[d] compensable injuries independent of his conviction and imprisonment," but dismissing illegal search claim because plaintiff "allege[d] no compensable injury from the search except that the evidence was used in his federal trial").

This bar has no application in a Fourth Amendment case. As the Seventh Circuit explained years ago, "some injury from a violation of the fourth amendment is unrelated to conviction," and a civil claim accrues when that injury occurs:

> Suppose the police search a house without probable cause, find cocaine, and throw it away, convicting the defendant on evidence in their possession before the search? Or suppose they search without probable cause, find evidence, and use it at trial on an inevitable discovery or good-faith theory? The court admits the evidence after finding that the exclusionary rule is not appropriately invoked, and the conviction is proper; . . . this does not mean that damages are unavailable for the invasion of privacy, the broken door, and so on.

Gonzalez v. Entress, 133 F.3d 551, 554 (7th Cir. 1998). "All *Heck* does is knock out one element of damages, the injury from the wrongful conviction, while the conviction stands." *Ibid.*; see also *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558 n.3 (10th Cir. 1999) ("We read the [*Heck*] Court's latter statement [at the end of footnote seven] as only limiting the damages a plaintiff may recover in such a case—the damages cannot include those for being convicted and imprisoned, at least not until the conviction has been overturned.").

Third, Wallace's argument confuses accrual with tolling. If a party does obtain more time to file suit because his damages continued to mount after some initial injury, this is the result of state tolling doctrines, not the federal accrual rule. Section 1983 borrows state limitations laws wholesale, including state tolling provisions. See *Wilson*, 471 U.S. at 269; *Board of Regents, University of State of New York v. Tomanio*, 446 U.S. 478, 484 (1980). This is the result of "a congressional decision to defer to the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Hardin v. Straub*, 490 U.S. 536, 538 (1989) (internal quotations omitted). Each State must make its own "value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones," including "tolling, revival, and questions of application." *Tomanio*, 446 U.S. at 485-486 (internal quotations omitted). "Courts . . . should not unravel state limitations rules unless their full application would defeat the goals of the federal statute at issue." *Hardin*, 490 U.S. at 539.

States have reached different decisions on the proper tolling rule in cases where damages aggregate over time. See *Gonzalez*, 133 F.3d at 554 (unlike Illinois, "[m]any states treat the time as tolled when the immediate injury is small in relation to the deferred injury and would not lead a reasonable person to file suit unless the greater loss comes to pass"). As the Seventh Circuit concluded below, these tolling doctrines—not a federal accrual standard—are the proper source for any rule deferring claim accrual as damages mount over time. Pet. App. 13 ("we are addressing only the question of accrual; other doctrines, such as equitable tolling, may also affect the time in which a particular suit may be brought").

C. Fourth Amendment Claims Do Not Implicate *Heck*'s Goal Of Avoiding An End Run Around Federal Habeas.

The Court emphasized in *Heck* that its decision lay "at the intersection of . . . the Civil Rights Act of 1871 and the federal habeas corpus statute." 512 U.S. at 480 (citations omitted); see also *id.* at 498 (Souter, J., concurring) (emphasizing need to "avoid collisions at the intersection of habeas and § 1983"). *Heck* and its progeny are thus concerned chiefly with cases falling within "the core of habeas corpus." *Dotson*, 544 U.S. at 79, 82 (internal quotations omitted). *Heck*'s "favorable termination" rule stops inmates from using § 1983 to attack their state convictions and sentences collaterally, without first exhausting their state court remedies as they must to seek federal habeas relief. See *Heck*, 512 U.S. at 480-481.

Federal habeas relief is not available to challenge the admission in criminal proceedings of evidence allegedly obtained in violation of the Fourth Amendment. See *Stone v. Powell*, 428 U.S. 465, 482 (1976). It necessarily follows that, with respect to Fourth Amendment claims, there is no risk of § 1983 serving a role reserved for federal habeas.

Ironically, Wallace's approach might actually allow federal civil suits to interfere with state criminal proceedings, for it would require § 1983 courts to decide, at the outset, whether *Heck*'s "favorable termination" rule applies in each case. This would entail determining what effect (if any) a successful Fourth Amendment challenge would have on the civil plaintiff's criminal trial, which often would require the § 1983 court to answer questions—*e.g.*, whether any error in admitting illegally obtained evidence was harmless, or whether authorities would have discovered the evidence by other means—that may be central to ongoing state proceedings.

II. Wallace's Approach to Accrual Is Unworkable.

Wallace's case-by-case approach, aside from running afoul of the letter and spirit of *Heck*, would negatively impact the administration of justice. First, requiring a fact-specific inquiry into claim accrual for each Fourth Amendment claim would defeat the certainty and predictability that this Court has endeavored to provide in the accrual and limitations context. Second, a case-by-case approach to accrual would require a new layer of fact-intensive litigation before § 1983 courts could address the merits of the plaintiff's civil claims.

A. Time Bars Should Be Certain And Predictable.

The principle that "[r]ules should be as simple and predictable as possible," *Morgan v. South Bend Community Sch. Corp.*, 797 F.2d 471, 477 (7th Cir. 1986), has particular force when it comes to statutes of limitations. Would-be plaintiffs and defendants need to know with certainty when potential claims can be filed and when the window for filing has closed, and clear, predictable rules avoid wasteful "byplay about limitations and allow[] the parties and the courts to concentrate their energies on the merits." *Herman v. City of Chicago*, 870 F.2d 400, 402 (7th Cir. 1989).

This Court has articulated bright-line rules for determining the proper limitations period in § 1983 cases precisely because less clear-cut alternatives lacked certainty and predictability. Until 1985, the statute of limitations in § 1983 cases was the limitations period assigned by state law to the most closely analogous claim. See *Owens v. Okure*, 488 U.S. 235, 239-240 (1989). This was a haphazard and unpredictable standard that forced parties to guess which limitations period a court would later decide to use. *Id.* at 240; *Wilson*, 471 U.S. at 272 ("The experience of the courts that have predicated their choice of correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably

breeds uncertainty and time-consuming litigation."). "[P]laintiffs and defendants often had no idea whether a federal civil rights claim was barred until a court ruled on their case," *Wilson*, 471 U.S. at 272, and resources were diverted to "unproductive and ever-increasing litigation" unrelated to the merits. *Id.* at 275 & n.34.

Two decisions, *Wilson v. Garcia*, *supra*, and *Owens v. Okure*, *supra*, provided certainty. *Wilson* requires § 1983 courts to use the state limitations period applicable to personal injury torts, and *Owens* puts an even finer point on the rule by requiring use of the State's "general or residual statute for personal injury actions." *Wilson*, 471 U.S. at 276-280; *Owens*, 488 U.S. at 250. This bright-line rule, which may "be applied with ease and predictability," *Owens*, 488 U.S. at 243, mitigates the "human" cost of uncertainty that is felt by "all parties": "Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." *Wilson*, 471 U.S. at 275 n.34. The rule, in short, advances "uniformity, certainty, and the minimization of unnecessary litigation." *Id.* at 275.

The same principles obtain with respect to the accrual date for § 1983 suits alleging Fourth Amendment violations. Both bench and bar would benefit from a rule that would allow "[p]otential § 1983 plaintiffs and defendants . . . [to] readily ascertain, with little risk of confusion or unpredictability, the applicable limitations period in advance of filing a § 1983 action." *Owens*, 488 U.S. at 245. Yet Wallace asks the Court to endorse an unpredictable, case-by-case approach to accrual—the furthest thing from the "firmly defined, easily applied rule[]" that should govern limitations inquiries. *Wilson*, 471 U.S. at 270 (internal quotations omitted). Under the fact-specific approach Wallace urges, plaintiffs run the risk that they

or their lawyers will wrongly predict the accrual date and file too late. The Seventh Circuit's bright-line rule puts counsel on notice that Fourth Amendment claims accrue with the challenged search or seizure.

For their part, States and municipalities have a strong interest in timely notice of alleged misconduct by their agents. If a plaintiff's claims are true, early notice allows for more effective discipline and other corrective measures. And if the allegations are unfounded, timely notice affords defendants the opportunity to gather and preserve evidence needed to defend against them. An uncertain, case-by-case rule would prompt some plaintiffs to wait, sometimes many years, before bringing their Fourth Amendment claims.

B. Wallace's Case-By-Case Approach Would Foster Wasteful Litigation.

As noted above, time-bar rules should avoid wasteful "byplay about limitations and allow[] the parties and the courts to concentrate their energies on the merits." *Herman*, 870 F.2d at 402. Wallace's proposed approach would have the opposite effect. It would require an often fact-intensive, preliminary round of litigation before a § 1983 court could decide whether a claim is even timely. The court may have to make this determination, moreover, many years after the challenged search or seizure, requiring defendants to marshal evidence that is stale (at best) and unavailable (at worst).

Covington v. City of New York, 171 F.3d 117 (2d Cir. 1999), illustrates the practical consequences of Wallace's approach. Following what Covington later claimed was an unlawful arrest, he was prosecuted for larceny and other crimes, before all charges were dismissed by operation of New York's speedy trial law. *Id.* at 120. Covington subsequently filed a § 1983 suit alleging false arrest and other constitutional violations. His false arrest claim was timely if it accrued when

his criminal charges were dismissed, but untimely if it accrued at the time of the challenged arrest. *Id.* at 119. The district court dismissed the claim on limitations grounds, finding that the earlier accrual date applied. *Id.* at 121. A divided panel of the Second Circuit reversed. Under the Circuit's case-by-case approach to Fourth Amendment claims, the panel held that accrual under *Heck* is an "inherently factual" issue that a court could not decide without "information . . . as to the nature of the evidence which might have been available against [plaintiff] in . . . [his criminal] proceedings." *Id.* at 123. Accordingly, the court of appeals concluded, the district court erred when it disposed of Covington's claim on summary judgment.

The proceedings that the Second Circuit ordered on remand would likely require protracted discovery and evidentiary findings by the district court. Moreover, such proceedings

> would place upon the district court an impossible and totally unrealistic burden. [They] would require that court to determine and assess the strength of all the evidence available to the state, to determine whether a motion to suppress evidence or statements based upon an alleged unlawful arrest or a claimed unreasonable search should be denied because any one or more of many exceptions would permit the evidence to be received, . . . or whether the state had evidence entirely independent of an arrest or search that would have been enough to obtain a conviction.

Id. at 128 (Glasser, J., dissenting). Even if there were a full trial before the criminal charges were dismissed, the § 1983 court would need to address a raft of questions—for example, whether the admission of evidence was harmless, or whether there would have been inevitable discovery, *Heck*, 512 U.S. at 487 n.7—of an "inherently factual" nature.

Under this scheme, § 1983 courts often would have to undertake this factual inquiry many years after the challenged search or seizure, and long after the statute of limitations on the claim has run. But just proving that the claim is untimely will require defendants to marshal evidence dating from the search or seizure, with all of the problems of stale and unavailable evidence that time bars are designed to avoid in the first place. See *Wilson*, 471 U.S. at 271 ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost.").

* * *

Before concluding, it is important to note that the *amici* States do *not* seek to encourage § 1983 courts to address the merits of Fourth Amendment claims before state criminal and post-conviction courts have had a full opportunity to do so. Rather, as *Heck* itself suggested, if a civil suit is filed before completion of state criminal proceedings, § 1983 courts should stay the action pending completion of the criminal proceedings, including any state post-conviction challenges to the plaintiff's conviction or sentence. See *Heck*, 512 U.S. at 487 n.8 ("[I]f a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings.") (citing *Colorado River Water Conservation Dist. v. United States*, 420 U.S. 800 (1976)); see also *id.* at 488 n.9 (preclusion rules may "take account of the policy . . . that state courts be given the first opportunity to review constitutional claims bearing upon state prisoners' release from custody"); Pet. App. 13 ("Individuals and attorneys who wish to preserve a claim for false arrest or similar Fourth Amendment violations should file their civil rights action at the time of arrest. It will still be possible, of course, for a district court to stay any such action until the criminal proceedings are concluded, should it conclude in its discretion that a stay would

be useful."). A stay would eliminate any prospect that a § 1983 court will decide the constitutionality of a challenged search or seizure before the state courts have an opportunity to do so.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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